Office-Supreme Court, U.S.
FILED
MAR 19 1983
ALEXANDER L. STEVAS,
CLERK

82-1552
NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1982

JACK W. GRIGSBY,

Petitioner

versus

DEPARTMENT OF ENERGY,
DONALD P. HODEL and
THE UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES
VOLUME I

MILLING, BENSON,
WOODWARD, HILLYER,
PIERSON & MILLER

OF COUNSEL

BLANCHARD, WALKER,
O'QUIN & ROBERTS

OF COUNSEL

H. H. HILLYER, JR.
(Counsel of Record)
1100 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3333

MARLIN RISINGER, JR.
W. MICHAEL ADAMS
15th Floor, First National
Bank Tower
P.O. Drawer 1126
Shreveport, Louisiana 71163
Telephone: (318) 221-6858

ATTORNEYS FOR
JACK W. GRIGSBY,
Petitioner

MARCH, 1983

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED[1]

1. May a Court of Appeals properly affirm a District Court's decision on review of a federal agency order which District Court decision affirmed the order of the federal agency on a basis *not* articulated by the agency order under review?

2. Is it error for a Court of Appeals to justify its decision herein on the grounds of its own clearly erroneous decision on a prior appeal which had directed the District Court to decide the matter under review on grounds not articulated by the agency's order under review?

3. Is the Court of Appeals precluded by the "law of the case" from re-examining and correcting its previous clearly erroneous decision; and, in any event, was not the agency precluded from urging such law of the case by the representations made to this Court by the Solicitor General of the United States in opposition to an application for certiorari from the first TECA decision herein, which representations were to the effect that the previous decision was "interlocutory" and would not prevent Grigsby from obtaining relief below?

---

[1] The caption of the case contains the names of all parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

1. THE DECISION OF TECA IS IN CONFLICT WITH DECISIONS OF THIS COURT IN THAT IT COUNTENANCES AFFIRMANCE OF AN AGENCY ORDER ON GROUNDS NOT ARTICULATED IN THE ORDER UNDER REVIEW. 9

2. THE DECISION OF TECA IN *GRIGSBY-II* ATTEMPTING TO JUSTIFY ITS PRIOR ERRONEOUS "INSTRUCTIONS" IN *GRIGSBY-I* IS ITSELF CLEARLY ERRONEOUS 10

3. THE COURT OF APPEALS WAS IN ERROR IN FINDING ITSELF TO BE BOUND BY ITS PRIOR ERRONEOUS RULING AS THE LAW OF THE CASE; PARTICULARLY, SINCE DOE WAS PRECLUDED FROM SO CONTENDING 12

4. THIS PETITION IS SUBJECT TO DISPOSITION UNDER RULE 23.1 14

CONCLUSION 15

TABLE OF AUTHORITIES

Case Name and Citation	Page
Burlington Truck Lines v. United States, 371 U.S. 156 (1962)	7, 9, 13
FPC v. Texaco Inc., 417 U.S. 380 (1974)	9
FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972)	9
Grigsby v. DOE, et al., 585 F.2d 1069 (TECA 1978), cert. den. 404 U.S. 908	2, 3, 5, 8, 9, 11, 13
Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980)	9
Jett v. Zink, 474 F.2d 149 (CA 5 1973)	14
Lawlor v. National Screen Services Corp., 352 U.S. 992 (1957)	13
Major v. Benton, 647 F.2d 110 (CA 10 1981)	12, 13
Wm. G. Roe & Company v. Armour & Company, 414 F.2d 862 (CA 5 1969)	12
Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (CA 3 1953)	14
SEC v. Chenery Corp., 318 U.S. 80 (1943)	9
Securities & Exchange Commission v. Otis & Co., 338 U.S. 843 (1949)	14
Texas Co. v. Gulf Refining Co., 26 F.2d 397 (CCA 5 1928), cert. den. 278 U.S. 625	14
United States v. Habig, 474 F.2d 57 (CA 7 1973)	12
White v. Murtha, 377 F.2d 428 (CA 5 1967)	12

Statutes **Page**

Section 211(g), Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904, note 2, 3
Emergency Petroleum Allocation Act of 1975, as amended, 15 U.S.C. §751, et seq. 3
Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §754 2
28 U.S.C. §1254(1) 2

Regulations

10 C.F.R. §212, 38 F.R. 22538 (August 22, 1973) 2
10 C.F.R. §212.72, 41 F.R. 36172 (August 26, 1976) 3

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JACK W. GRIGSBY,
Petitioner

versus

DEPARTMENT OF ENERGY,
DONALD P. HODEL and
THE UNITED STATES OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Jack W. Grigsby ("Grigsby") petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States ("TECA").

OPINIONS BELOW

The opinion of the Court of Appeals ("*Grigsby-II*"), not yet reported, appears in Appendix N, hereto. The order denying rehearing is also not reported and appears in Appendix L. The opinion of the District Court is not reported and appears in Appendix Q. The prior opinion of the Court of Appeals ("*Grigsby-I*"), reversing in part a summary judgment rendered by the District Court, and remanding

the case, is reported at 585 F.2d 1069, and appears in Appendix B. This Court's denial of certiorari from *Grigsby-I* is reported at 404 U.S. 908. The opinion of the District Court, found in Appendix I, on its summary judgment is not reported. Nor is there any official report of the decision of the Department of Energy ("DOE") on appeal (Appendix J), nor of the remedial order of DOE (Appendix K).

JURISDICTION

The order of the Court of Appeals denying rehearing was dated and entered February 22, 1983 (Appendix L). This resulted from a timely petition for rehearing (Appendix M), filed by Grigsby on January 28, 1983, of the decision and opinion of the Court of Appeals decided on January 18, 1983 (Appendix N), and entered the same day.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §754, incorporating Section 211(g) of the Economic Stabilization Act of 1970, as amended (12 U.S.C. §1904, note).

STATUTES AND REGULATIONS INVOLVED

Originally at issue here were the interpretation and application of the "property definition" in the Regulations, initially adopted by the Cost of Living Council, which read as follows:

> "Property is the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 38 Fed. Reg. 22538 (August 22, 1973); 10 C.F.R. §212.

This was adopted pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904, note. The definition was re-adopted by the Federal Energy Administration ("FEA," now "DOE") pursuant to the Emergency Petroleum Allocation Act of 1975, as amended, 15 U.S.C. §751, *et seq.* (Since no question is raised as to the meaning or effect of the statutes, they are not copied here.)

The property definition in the Regulations was amended, effective September 1, 1976, to read:

> " 'Property' means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation." 41 Fed. Reg. 36172, August 26, 1976; 10 C.F.R. §212.72.

STATEMENT OF THE CASE[2]

In 1968, Grigsby, as operator, drilled a producing

[2] This filing is divided into three parts: Volume I is this Petition; Volume II consists of Appendices A through K, pages A-1 through A-114; Volume III consists of Appendices L through R, pages A-115 through A-145. Citations to the Appendices will be made by stating, first, the letter of the alphabet assigned to the particular Appendix, followed by the page in Volumes II or III at which the particular reference is found; for example: "App. K, pp. A-92-93." References to the record will be made by first writing the letter "R," followed by the page in the record, as, for example: "R. 385."

References to "*Grigsby-I*" are to the opinion on rehearing in *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), found in App. B, p. A-3,

oil well known as the Lucky Strike Well No. 1. (Admission No. 1, R. 131.) Louisiana Department of Conservation (now Office of Conservation) Order No. 464-F-1, effective January 22, 1969, created a unit around said well for production from the Heywood Sand reservoir designated as "Heywood RA SUB," and Grigsby was named unit operator. (Exh. Chauviere-4, R. 385.) This Order, under DOE's interpretations of its own regulations, had the effect of integrating diverse leased premises within the unit as to the particular reservoir, and of segregating those portions of the leased premises within the unit from those without the unit, both horizontally and vertically. Thus, under the "property definition," the unit was the "property"; a well drilled to and producing from a reservoir other than the unitized reservoir within the surface boundaries of the unit was producing from a "property" different from the Heywood RA SUB. (*Grigsby-I*, App. B, p. A-13-14.)

After producing for some time, the Lucky Strike Well began to produce excessive quantities of salt water. It was anticipated by Grigsby that the well would shortly "water-out," but that a well drilled "up-structure" on another leased premises within the unit would be productive from the unitized reservoir. Grigsby accordingly applied for and obtained from the Department of Conservation permission to drill a substitute unit well, and Grigsby thereupon drilled the Robert Leger No. 1 Well on another leased premises within the surface periphery of the Heywood RA SUB. (R. 301-302; 312-313.) The well was tested in the Heywood Sand reservoir, but was found to be non-productive ("watered-out"). To Grigsby's surprise, a

---

(Footnote 2 continued)
et seq. References to "*Grigsby-II*" are to the opinion of TECA with respect to which the writ of certiorari is herein sought, found in App. N, p. A-121, *et seq.*

reservoir (the Upper Heywood "A" Sand reservoir) above the Heywood Sand reservoir, and separated therefrom by a thin shale barrier, was found to be productive and the Robert Leger No. 1 Well was completed therein on October 24, 1974. (R. 302-305; R. 367-371.)

Grigsby determined that production from the Robert Leger Well should be treated by him as "new oil," since he was producing from a "property" different from the Heywood RA SUB. (R. 306.) Grigsby therefore certified the oil as new crude petroleum and charged the new crude petroleum price to the purchaser. (R. 306.) This constituted the "treatment" of such oil as production from a different property under DOE's regulations and rulings. (*Cf.* DOE's Admissions Nos. 5(c), 25-28, 31, R. 130, *et seq.*) "*In hindsight,* therefore, Grigsby is correct: the Robert Leger Well No. 1 production was not from the same reservoir, hence unitized premises, as the Lucky Strike Well No. 1 production." *Grigsby v. DOE,* 585 F.2d 1069, at p. 1084 (TECA 1978). (App. B, p. A-14.)

While Grigsby had determined that the Robert Leger No. 1 Well was not producing from the unitized reservoir, under Department of Conservation practice, a period of production history would be necessary before he could obtain an order prescribing a new unit for the upper reservoir. In retrospect, six months' production history would have been sufficient, but Grigsby waited for a longer period and then applied for an order. (R. 304-305, 318.) He also felt that he should continue to pay royalty to the same persons in the same proportions, since he was confident that a new unit would have the same surface periphery. For this, and other reasons, he did so pay the royalties. (R. 307-310, 319-320.)

After a public hearing, the Commissioner of Conservation issued Order No. 464-K, effective June 15, 1976. (Exh. Chauviere-7, R. 394.) At the hearing, it was established that the Upper Heywood "A" Sand (in which the Robert Leger Well was completed) was physically separate from the Heywood Sand (in which the Lucky Strike Well was completed), and a unit was created unitizing the Upper Heywood "A" Sand, with the Robert Leger Well as the unit well. This unit was designated the Upper Heywood "A" RA SUB. (R. 364-370.) The Conservation Department Order was a matter of public record, both in the Conservation Department offices in Baton Rouge and in the conveyance records of the Parish where the unitized premises were situated.

Meanwhile, DOE (at that time called "FEA") was conducting an audit of Grigsby's compliance with the oil pricing regulations. This audit resulted in a Remedial Order dated November 29, 1976, which found that Grigsby had improperly charged "new oil" prices for "old oil." (App. K, p. A-88, et seq.) The Remedial Order was based on the wholly erroneous conclusion that the Heywood RA SUB covered *both* the Heywood Sand reservoir and the Upper Heywood "A" Sand reservoir, so that the Robert Leger Well No. 1 was producing from the same "property" as that from which the Lucky Strike Well No. 1 had formerly produced. The Remedial Order ignored the existence of Order No. 464-K, issued June 26, 1976, and also ignored a then recent change in DOE's own regulations.

Grigsby filed an administrative appeal, in which Order No. 464-K was prominently mentioned, pointing out the errors of the Remedial Order. The agency persisted in its erroneous concept (that the Heywood RA SUB covered the Upper Heywood "A" Sand), and, while making some

revisions, essentially upheld the Remedial Order in its Decision on Appeal. (App. J, p. A-67, *et seq.*)

Grigsby petitioned for review to the United States District Court for the Western District of Louisiana. DOE prematurely moved for summary judgment, on the clearly erroneous ground that only one "property" was involved because (it said) the Heywood RA SUB comprised within its legal effect the Upper Heywood "A" reservoir. The District Court granted the judgment. (App. I, p. A-50.) Grigsby appealed to TECA. TECA, on original hearing, "bought" DOE's argument to the effect that the Heywood RA SUB included the reservoir from which the Robert Leger Well was producing, but expressed its holding in terms so strong as to be clearly refutable. (App. D, p. A-21, *et seq.*) On Grigsby's petition for rehearing, TECA reversed the summary judgment as premature and clearly erroneous and remanded the case. (App. B, p. A-3, *et seq.*) But TECA went further and gave stringent instructions to the District Court which required that Court to decide the case on grounds suggested by the argument of DOE's counsel on appeal which were never articulated by the agency's order under review—and this in spite of Grigsby's citation in its Reply Brief of and quotation from *Burlington Truck Lines v. United States,* 371 U.S. 156, 159 (1962).[3]

It was open knowledge that Grigsby could not comply with the instructions. If they were binding on remand, they amounted to a direction to enter judgment for DOE.

[3] The Reply Brief stated (pp. 4-5): "...it is familiar law that the agency action may not be supported by '...appellate counsel's post hoc rationalizations for agency action...' (*Burlington Truck Lines v. United States,* 371 U.S. 156, 169 (1962); *Real v. Simon,* 514 F.2d 738, 739 (C.A. 5th 1975)) and must be upheld on the basis articulated by the agency itself."

Grigsby petitioned this Court for a writ of certiorari aimed at setting aside the instructions as requiring the District Court to decide the case "...not on grounds articulated by the agency but on grounds first articulated in the *post hoc* argument of the agency's appellate counsel." Petition, p. 2, *Jack W. Grigsby v. Department of Energy, et al.*, No. 78-742, October Term, 1978. In a brief in opposition to the granting of the writ, the Solicitor General responded to Grigsby's fears as to the restrictive effect of the instructions on remand, as follows:

> "1. *The judgment below is interlocutory.* The District Court *may conclude* that, *under Louisiana law* and *FEA regulations,* the Leger Well *always* was producing from a new 'property' and thus rule in favor of petitioner, thereby obviating any occasion for this Court's review. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)." (Emphasis added.)

Certiorari was denied. *Grigsby v. Department of Energy, et al.*, 404 U.S. 908.

On remand, Grigsby's fears as to the instructions were realized. The District Judge felt himself to be bound by the instructions and rendered judgment against Grigsby. (App. R, pp. A-141-142.) Grigsby appealed to TECA. TECA affirmed the District Court on the ground that the District Court was merely following TECA's mandate, and refused to reconsider the validity of the instructions on the grounds that they were the law of the case and, in any event, were not erroneous. (App. N, pp. A-121-123.) Grigsby applied for a rehearing (App. M, p. A-116), which was denied without opinion. (App. L, p. A-115.) Hence, this petition.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF TECA IS IN CONFLICT WITH DECISIONS OF THIS COURT IN THAT IT COUNTENANCES AFFIRMANCE OF AN AGENCY ORDER ON GROUNDS NOT ARTICULATED IN THE ORDER UNDER REVIEW.

Ever since this Court's decision in *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), it has been consistently held that if an agency's discretionary order is to be upheld, it must be upheld, if at all, on the same basis articulated in the order by the agency itself. *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-169 (1962); *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 249 (1972); *FPC v. Texaco Inc.,* 417 U.S. 380, 397 (1974); *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 631, n. 31 (1980). Here, the agency's articulated basis for its order was that the "property" unitized in 1969 by the Louisiana Department of Conservation in the Heywood RA SUB included the reservoir from which the Robert Leger Well No. 1 produced, commencing in October, 1974. (App. J, p. A-67, *et seq.*; App. K, p. A-88, *et seq.*) This was clearly erroneous, as held by TECA in *"Grigsby-I." Grigsby v. DOE, et al.,* 585 F.2d 1069 (TECA 1978). But this agency order was affirmed by the District Court on remand, not on this or any other ground mentioned by the agency's order, but on grounds suggested by the *post hoc* argument of DOE's appellate counsel to TECA and incorporated in TECA's "instructions" in *Grigsby I.* And TECA, in *"Grigsby-II,"* affirmed the District Court on the ground that the District Court was bound to comply with TECA's mandate in *Grigsby I.* This circular rationale supplanted the rule of *Burlington Truck Lines* and the other

cases above cited.

TECA, in *Grigsby-II,* has without explanation (even though explanation was plainly invited (App. M, p. A-117)) decided the case in apparent disregard of this Court's jurisprudence. Such a decision, if permitted to stand, could erode the precedential effect of this Court's decisions on the standards of review of federal agency orders, and thereby create significant and recurring problems. Such a decision warrants the granting of the writ.

2. THE DECISION OF TECA IN *GRIGSBY II* ATTEMPTING TO JUSTIFY ITS PRIOR ERRONEOUS "INSTRUCTIONS" IN *GRIGSBY-I* IS ITSELF CLEARLY ERRONEOUS.

TECA's opinion in *Grigsby-II* states (App. N, p. A-123):

> "More importantly, we believe the holdings in *Grigsby I* were and remain correct. The prior opinion stated that the need for certainty and finality in the enforcement of price control regulations militated against retroactive application of the LOC's subsequent separate unitization and held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact."

Yet at the time of the Remedial Order (November 29, 1976), DOE presumably had available the Louisiana Department of Conservation Order No. 464-K[4] (issued

[4] La. R.S. 30:11.1 requires that the Commissioner record such an order in the conveyance records of the parish in which the property is situated within 30 days after issuance.

June 24, 1976), and certainly had it available at the time of the issuance of the Decision on Appeal (issued March 8, 1977), for it is mentioned therein. (App. J, pp. A-74-75.) Thus, at the time of the agency's final order, of which review was sought, there was before the agency conclusive evidence that the Robert Leger Well No. 1 was producing from a "property" different from the prior Heywood RA SUB, and DOE was not "entitled to rely on earlier classifications by the regulatory state," because it had conclusive evidence to the contrary in its possession.[5]

Neither the Remedial Order nor the Decision on Appeal articulated as a basis for decision the grounds given by TECA in the above quotation. TECA's use of these grounds as support for its instructions in *Grigsby-I* was clear error. Further, *Grigsby-II's* reference to DOE's right to "rely on earlier classifications by the regulatory state" is a *non-sequitur:* The previous unit order establishing the Heywood RA SUB did not purport to cover the Upper Heywood "A" Sand reservoir (R. 359-361, 364-370) and could not have been "relied on" as affecting the production from the Robert Leger Well No. 1. In any event, at the time of the issuance of DOE's final order which is under review (March 8, 1977), the agency had before it documents making it legally impossible for it to rely on any "earlier classifications by the regulatory state," even if they had existed. The problem was that DOE, having all of the evidence in hand, was still bemused by the conceit that the Heywood RA SUB was a "property" which included the Upper Heywood "A" Sand reservoir, and pitched its

[5] This is the same evidence that caused TECA to hold (*Grigsby-I*, 585 F.2d 1069 at p. 1084; App. B, p. A-14): "*In hindsight*...Grigsby is correct: the Robert Leger Well No. 1 production was not from the same reservoir, hence unitized premises, as the Lucky Strike Well No. 1 production."

decision on that ground and not on any ground mentioned by TECA.

Since *Grigsby-I* was clearly erroneous in issuing instructions to the District Court to decide the case in a manner at variance with this Court's decisions. *Grigsby-II* is clearly erroneous in seeking to justify such instructions on the basis of matters equally extraneous to the articulations of the order under review. And the error is compounded by the attempt to impute reliance on the agency's part on matters that could not legally be relied upon.

3. THE COURT OF APPEALS WAS IN ERROR IN FINDING ITSELF TO BE BOUND BY ITS PRIOR ERRONEOUS RULING AS THE LAW OF THE CASE; PARTICULARLY, SINCE DOE WAS PRECLUDED FROM SO CONTENDING.

Grigsby-II states (App. N, pp. A-122-123):

> "Appellant actually seeks review of the decision by this Court in *Grigsby I*, claiming that the instructions therein to the trial court were erroneous. The prior holdings of this Court are the law of the case, and were properly followed by the district court."

As above shown, TECA's "instructions" to the District Court in *Grigsby-I* were clearly erroneous. The "law of the case" did not prevent TECA from recognizing and correcting its own error. *Cf. White v. Murtha*, 377 F.2d 428, 431-432 (CA 5 1967); *Wm. G. Roe & Company v. Armour & Company*, 414 F.2d 862, 867-868 (CA 5 1969); *United States v. Habig*, 474 F.2d 57, 60 (CA 7 1973); *Major*

v. Benton, 647 F.2d 110, 112 (CA 10 1981). Further, by making the representations to this Court in the Solicitor General's Brief in Opposition (quoted *supra*, p. 8) to Grigsby's prior petition for a writ of certiorari (No. 78-742, October Term, 1978), DOE was precluded from relying on the "instructions" as the "law of the case."

Grigsby's prior petition to this Court pointed out the nature of TECA's instructions, showed that the agency order under review had not articulated any such grounds, and that under the holding of *Burlington Truck Lines, supra*, the instructions were clearly erroneous. It was Grigsby's hope to elicit this Court's response to the restrictive instructions in the manner of *Lawlor v. National Screen Services Corp.*, 352 U.S. 992 (1957), where this Court reversed and remanded a case so as to free a District Court of restrictions on a remand imposed by a Court of Appeals.

In order to respond to Grigsby's fears as to the restrictive effect of the instructions on remand (and to avoid review), the Solicitor General assured the Court (*supra*, p. 8) that *Grigsby-I* was "interlocutory"[6] and that the District Court could "...conclude that under Louisiana law and FEA regulations the Leger Well always was producing from a new 'property' and thus rule in favor of petitioner thereby obviating any occasion for this Court's review...." This representation was successful. Certiorari was denied. 440 U.S. 908.

In the context of a response to the statements of the petition for the writ, this was a clear reassurance that the

[6] The dictionary meaning of "interlocutory" is "...not final or definitive..." Webster's Third New International Dictionary, p. 731.

instructions were neither final nor binding on the District Court. Such a result was the target of Grigsby's petition for certiorari; Grigsby's thrust was successfully parried by the Solicitor General's assurance to this Court; the representation bound DOE and precluded it from thereafter urging that the instructions were final and binding. *Cf. Texas Co. v. Gulf Refining Co.*, 26 F.2d 397 (CCA 5 1928), cert. den. 278 U.S. 625; *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 512-513 (CA 3 1953); *Jett v. Zink*, 474 F.2d 149, 155 (CA 5 1973).

4. THIS PETITION IS SUBJECT TO DISPOSITION UNDER RULE 23.1

There is no further briefing or oral argument needed to establish that the Court of Appeals affirmed a District Court judgment which affirmed a DOE order on a basis not articulated by the DOE order under review. This is shown on the face of the record. Though this circumstance was expressly called to the attention of the Court of Appeals (as well as the District Court), the Court of Appeals ignored the decisions of this Court cited to it. There is no question that, but for the erroneous instructions of *Grigsby-I*, the District Court would have been constrained to reverse the DOE order under review because it, too, was clearly erroneous. (*Grigsby-I* is, alone, sufficient authority for that statement, since the summary judgment which was reversed in *Grigsby-I* as "clearly erroneous" was based on the self-same ground as the basis for decision articulated in the agency order under review.)

Under such circumstances, it is respectfully submitted that a summary reversal of *Grigsby-II* pursuant to Rule 23.1 would be appropriate here. *Cf., e.g., Securities & Exchange Commission v. Otis & Co.*, 338 U.S. 843 (1949).

The case might then be remanded to the District Court for final disposition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MILLING, BENSON, WOODWARD, HILLYER, PIERSON & MILLER

OF COUNSEL

BLANCHARD, WALKER, O'QUIN & ROBERTS

OF COUNSEL

H. H. HILLYER, JR.
(Counsel of Record)
1100 Whitney Building
New Orleans, La. 70130
Telephone: (504) 581-3333

MARLIN RISINGER, JR.
W. MICHAEL ADAMS
15th Floor, First National Bank Tower
P.O. Drawer 1126
Shreveport, La. 71163
Telephone: (318) 221-6858

ATTORNEYS FOR
JACK W. GRIGSBY
Petitioner

MARCH, 1983

82-1552
NO.

Office-Supreme Court, U.S.
FILED
MAR 19 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK W. GRIGSBY,
Petitioner

versus

DEPARTMENT OF ENERGY,
DONALD P. HODEL and
THE UNITED STATES OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES
VOLUME II—APPENDICES "A-K"

MILLING, BENSON,
WOODWARD, HILLYER,
PIERSON & MILLER

OF COUNSEL

BLANCHARD, WALKER,
O'QUIN & ROBERTS

OF COUNSEL

H. H. HILLYER, JR.
(Counsel of Record)
1100 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3333

MARLIN RISINGER, JR.
W. MICHAEL ADAMS
15th Floor, First National
Bank Tower
P.O. Drawer 1126
Shreveport, Louisiana 71163
Telephone: (318) 221-6858

ATTORNEYS FOR
JACK W. GRIGSBY,
Petitioner

MARCH, 1983

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

PAGE

Appendix A - Judgment (TECA) A-1

Appendix B - Opinion on Rehearing (TECA) A-3

Appendix C - Order Granting Rehearing (TECA) A-20

Appendix D - Original Opinion (TECA) A-21

Appendix E - Partial Summary Judgment (District Court) A-43

Appendix F - Minute Entry (District Court) A-45

Appendix G - Partial Summary Judgment (District Court) A-47

Appendix H - Partial Summary Judgment (District Court) A-48

Appendix I - Memorandum Ruling (District Court) A-50

Appendix J - Decision on Appeal (FEA) A-67

Appendix K - Remedial Order (FEA) A-88

APPENDIX A
JUDGMENT (TEMPORARY EMERGENCY COURT OF APPEALS)

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-28

JACK W. GRIGSBY,
Plaintiff-Appellant,

v.

DEPARTMENT OF ENERGY, JAMES R. SCHLESINGER and THE UNITED STATES OF AMERICA,
Defendants-Appellees.

BEFORE HONORABLE WALTER E. HOFFMAN, HONORABLE JOE MCDONALD INGRAHAM and HONORABLE WALTER P. GEWIN, JUDGES.

This cause came on to be reconsidered on Petition for Rehearing and was submitted on the briefs.

In consideration whereof, IT IS ORDERED that judgment of the United States District Court for the Western District of Louisiana is affirmed in part, reversed and remanded in part.

FOR THE COURT:

S/ Ruth H. Jacobson
Ruth H. Jacobson
Clerk

October 5, 1978

District Court No. 77-0258

A TRUE COPY

Ruth H. Jacobson
Clerk

By: s/ Donna M. Bold
Deputy Clerk

APPENDIX B

Temporary Emergency Court of Appeals of the United States

No. 5-28

JACK W. GRIGSBY, APPELLANT,

v.

DEPARTMENT OF ENERGY, JAMES R. SCHLESINGER AND THE UNITED STATES OF AMERICA, APPELLEES.

Appeal from the United States District Court
for the Western District of Louisiana

(Civil No. 77-0258)

(Argued January 6, 1978 Decided May 2, 1978)

ON PETITION FOR REHEARING

(Decided October 5, 1978)

H. H. HILLYER, JR., with whom J. Henry Phillips III, Milling, Benson, Woodward, Hillyer & Pierson, New Orleans, Louisiana; and W. Michael Adams, Blanchard, Walker, O'Quin & Roberts, Shreveport, Louisiana, were on the brief for the Appellant.

ARTHUR E. GOWRAN, with whom Robert G. Heiss, Department of Energy, Washington, D.C.; and Barbara Ward, with whom Dennis G. Linder and Barbara Allen Babcock, Assistant Attorney General, Department of Justice, Washington, D.C., were on the brief for the Appellees.

DAVID J. BECK, Fulbright & Jaworski, Houston, Texas, with whom Keith A. Jones and Warren Belmar, Fulbright & Jaworski, Washington, D.C., were on the brief

as Amici Curiae for Exxon Corporation, Texas Independent Producers & Royalty Owners Association, and Energy Consumers & Producers Association.

RUSH MOODY, JR. and C. MICHAEL BUXTON, Vinson & Elkins, Washington, D.C.; and Stephen H. Bard, Of Counsel, Texaco, Inc., White Plains, New York, were on the brief as Amicus Curiae for Texaco, Inc.

ALLAN ABBOT TUTTLE, with whom James R. Patton, Jr., Patton, Boggs & Blow, Washington, D.C.; and Harry E. Barsh, Jr., Camp, Carmouche, Palmer, Carwile & Barsh, Washington, D.C., were on the brief as Amicus Curiae for the State of Louisiana.

Before HOFFMAN, INGRAHAM and GEWIN, Judges.

INGRAHAM, Judge.

This case involving compliance with federal oil pricing regulations is before this court on a petition for rehearing filed on May 16, 1978, pursuant to General Rules 1 and 33 of this court and Rule 40 of the Federal Rules of Appellate Procedure. The petition was duly granted on May 22, 1978. On this rehearing, appellant Jack W. Grigsby alleges that our opinion of May 2, 1978, contains material factual errors, which warrant reversal of the district court or, in the alternative, remand to the district court for further proceedings consistent with correction of the factual errors. Specifically, Grigsby argues that our opinion misinterpreted two orders issued by the Louisiana Commissioner of Conservation which affect oil prices in the North Jennings Field. We find some merit in Grigsby's argument. Accordingly, we affirm the judgment of the district court in part and reverse and remand in part. Our opinion of May 2, 1978, is modified as follows: the three paragraph introduction and the section entitled "West Pontchartrain Property" are readopted in toto; the sections entitled "The North Jennings Property" and "Summary Judgment and Con-

clusion" are vacated in toto and are replaced by the sections below.*

THE NORTH JENNINGS PROPERTY

Grigsby operated the Lucky Strike Well No. 1, the unit well for the Heywood Sand, Reservoir A, Sand Unit B[a] (Heywood RA SU B) located in the North Jennings Field. The unit was created and the unit well designated on February 20, 1969, by Order No. 464-F-1 of the Louisiana Commissioner of Conservation.[b] The Commissioner's order pooled five separate leaseholds within the unit area. In accordance with state law, the pooling order provided that the production from the unit would be allocated among the leases comprising the unit on a surface acreage basis.

---

* In order to avoid confusion with the footnote system used in our prior opinion, the footnotes herein will be designated alphabetically.

[a] The term "unit" refers to a "drilling unit," a designation by state authorities for "the maximum area which may be efficiently and economically drained by one well." LA. REV. STAT. ANN. § 30:9(B) (1975). "Unitization" refers to the compulsory pooling of interests to form a single drilling unit. Production from unitized premises is allocated to the various interests comprising the unit on a surface acreage basis.

[b] Order No. 464 of the Commissioner of Conservation, issued on May 5, 1959, was the first order to recognize a drilling and production unit in the Heywood Sand, Reservoir A. The Texas Pacific Coal & Oil Company was the operator of the designated unit well. Order No. 464-F-1, issued on February 20, 1969, established two units in place of the one unit established by Order No. 464: the Heywood RA SU A and the Heywood RA SU B. The definitions of these two units and corresponding unit wells were altered by Order No. 464-F-3. All drilling units created by orders of the Commissioner of Conservation consisted of premises on different leaseholds which were force-pooled.

After a period of substantial production, the Lucky Strike Well No. 1 began to produce excessive salt water. Grigsby thus applied to the Louisiana Department of Conservation for permission to drill a "substitute unit well" for the Heywood RA SU B. By Order No. 464-F-2, dated July 26, 1974, the Commissioner authorized Grigsby to drill a well on a different lease in the unit. The "substitute unit well," the Robert Leger Well No. 1, began production on October 14, 1974. In the same month, Grigsby terminated crude oil production from the Lucky Strike Well No. 1. From October 14, 1974, until the present, Grigsby has treated production of crude oil from the Robert Leger Well No. 1 as "new oil" under FEA regulations, charging upper tier prices.

On March 12, 1976, Grigsby gave written notice to the Commissioner of Conservation of his intent to request the issuance of orders recognizing two reservoirs in the North Jennings Field.[e] Pursuant to Grigsby's request and after a hearing, the Commissioner of Conservation issued two orders on June 24, 1976. Order No. 464-F-3 acknowledged the existence of two reservoirs in the North Jennings Field: the Heywood Sand, Reservoir A, and the Upper Heywood "A" Sand, Reservoir A. Order No. 464-K established two drilling and production units which force-pooled the participating lease-hold premises for the Upper Heywood "A" Sand, Reservoir A: the Upper Heywood "A" Sand, Reservoir A, Sand Unit A (Upper Heywood RA SU A), and the Upper Heywood "A" Sand, Reservoir A, Sand Unit B (Upper Heywood RA SU B). The unit well for the Upper Heywood RA SU A, the Robert Leger Well No. 2, was operated by the Texas Pacific Coal & Oil Company. The unit well for the Upper Heywood RA

---

[e] Grigsby's notice to the Commissioner of Conservation was given within three weeks following his receipt on February 20, 1976, of the Notice of Probable Violation issued by the FEA Region VI.

SU B, the Robert Leger Well No. 1, was operated by Grigsby. The Robert Leger Well No. 1 had formerly been the "substitute unit well" for the Heywood RA SU B.[d]

On November 29, 1976, the FEA issued a remedial order to Grigsby for violations of Cost of Living Council Phase IV Petroleum Price Regulations, 6 CFR § 150.353 (1974), and FEA Petroleum Price Regulations, 10 CFR § 212.73 (1977). The FEA determined that Grigsby had overcharged Cities Service Oil Company and Cities Service Pipeline Company by billing them at "new oil" prices instead of "old oil" prices from October 14, 1974, until the date of the remedial order. Grigsby was ordered to reduce prices for crude oil produced from the Robert Leger Well No. 1 immediately, to conform prices to the FEA's interpretation of 10 CFR §§ 212.73, 212.74 (1974), and to refund past overcharges with interest to Cities Service.[e]

On December 11, 1976, Grigsby filed an appeal of the remedial order with the FEA's Office of Exceptions and Appeals. The remedial order was essentially upheld, although the amount of some overcharges was reduced.[f]

---

[d] The Robert Leger Well No. 1 is presently the unit well for both the Upper Heywood RA SU B, Order No. 464-K, and the Heywood RA SU B, Order No. 464-F-3. We do not understand why the Robert Leger Well No. 1 was redesignated by the latter order as the unit well for the Heywood RA SU B, if, as the record suggests, this well was a dry hole.

[e] The court found that the overcharges totaled $342,742.43. Of this amount, $46,092.81 represents excess severance tax paid to the State of Louisiana by the buyer because of the overcharge on the price of the oil. Grigsby argued below that he should not have to refund this excess amount of tax to the purchasers, but the district court rejected this argument. Since Grigsby does not forward this contention on appeal, we need not explore the rationale behind the district court's finding.

[f] The remedial order had directed Grigsby to refund amounts in excess of the ceiling price for "old oil" and to charge "old

Grigsby then appealed the FEA action to the United States District Court.[2] The court granted the FEA's motion for summary judgment upholding the FEA orders. The court also entered partial summary judgment in favor of the FEA on its counterclaim, ordering Grigsby

---

oil" prices in the future. The appeal decision of the FEA reversed the remedial order insofar as prices were calculated after September 1, 1976, the effective date of the FEA amendment of the definition of "property." The amendment provides:

> A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from and not in communication with, any other producing formation.

10 CFR § 212.72 (1977); *see also* Ruling 1977-2, 42 Fed. Reg. 4409 (1977). The FEA was convinced that the reservoir from which the Robert Leger Well No. 1 was currently producing crude oil (Upper Heywood "A" Sand, Reservoir A) was separate and distinct from the reservoir from which Grigsby was producing crude oil prior to October 14, 1974 (Heywood Sand, Reservoir A). Grigsby was accordingly authorized to charge "new oil" prices after September 1, 1976.

[2] Grigsby predicated jurisdiction upon two grounds. First, Grigsby asserted that the action arose under the laws of the United States and exceeded $10,000. 28 U.S.C. § 1331 (Supp. 1977). Among the United States laws implicated were the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977); the Federal Energy Administration Act, 12 U.S.C. §§ 761-786 (1976); the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §§ 751-760h (1976); and the Administrative Procedure Act, 5 U.S.C. § 703 (Supp. 1977). Additionally, Grigsby based jurisdiction upon § 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977), incorporated by reference into the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. § 754 (1976). Appellate jurisdiction lies with this court by virtue of these latter two statutes.

to comply with the FEA remedial order as modified by the appeal decision and order.[h]

As an operator of crude oil producing properties, Grigsby is subject to the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §§ 751-760h (1977), as well as the DOE regulations promulgated thereunder. These regulations spell out the two-tier crude oil pricing system, a pricing program which we have discussed and upheld on a number of occasions. *See, e.g., Griffin v. United States*, 537 F.2d 1130 (Em.App. 1976); *Cities Service Co. v. FEA*, 529 F.2d 1016 (Em.App. 1975); *Consumers Union v. Sawhill*, 525 F.2d 1068 (Em.App. 1975).

The two-tier pricing system was established in August, 1973, pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977). The implementing regulations were first promulgated by the Cost of Living Council, *see* 6 CFR §§ 150.353, 150.354 (1974), later adopted by the FEA, and are now enforced by the DOE. They provide that "old oil" may not be sold above the lower tier ceiling price, 10 CFR § 212.73 (1977), and that "new oil" may not be sold above the upper tier ceiling price, 10 CFR § 212.74 (1977). The upper tier ceiling price is based upon the highest posted price on September 30, 1975, and the lower tier ceiling price is based upon the highest posted price on May 15, 1973.[i]

---

[h] The district court did not enter summary judgment on the two remaining issues and the counterclaim at this time. One of these issues concerned the revised remedial order issued on April 22, 1977, with respect to the Pontchartrain property which was discussed in our opinion of May 2, 1978. At the time, this revised order was not in the record. Summary judgment was entered affirming this order on November 16, 1977. The other issue involved civil penalties against Grigsby and will eventually require a full evidentiary hearing.

[i] 10 CFR § 212.74(b) (1977) provides:

> The upper tier ceiling price for a particular grade of domestic crude oil in a particular field is (1) the highest

Crude oil is treated as "new oil" to the extent that monthly production exceeds the "base production control level" (BPCL), or production, from the same "property" in the same month in 1972.[j] The threshold inquiry in determining the amount of "new oil" produced from a premises is therefore whether the premises is a "property" that produced oil in 1972.

---

posted price on September 30, 1975, for transactions in that grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; less (2) $1.32 per barrel.

10 CFR § 212.73(b) (1977) provides:

> The lower tier ceiling price for a particular grade of domestic crude oil in a particular field other than in Alaska or California is the sum of: (1) The highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; plus (2) $1.35 per barrel.

[j] The regulations define "new crude oil" prior to February 1, 1976, as the domestic crude oil production sold in a specific month, less (A) the base production control level for that month, and less (B) the current cumulative deficiency. 10 CFR § 212.72 (1977). The regulations define "base production control level" in relation to crude oil sold before February 1, 1976, as the number of barrels of domestic crude oil produced and sold from that "property" in the same month of 1972. By fusing the definitions of "new crude oil" and "base production control level," "new crude oil" before February 1, 1976, is generally the number of barrels of oil produced in a month minus the number of barrels produced on that same "property" during the same month in 1972.

A. PRODUCTION FROM THE LEGER LEASEHOLD?

Grigsby argues that, in 1974, when he had to decide whether the production from the Rober Leger Well No. 1 was from the same or a different "property" than that from the Lucky Strike Well No. 1, he had only the definition in the regulations to follow: "Property is the right which arises from a lease or from a fee interest to produce domestic crude oil." 10 CFR § 212.72 (1975). He contends that he read the definition literally—that "property" was the "right which arises from a *lease*." *Id.* (emphasis added). Since the Robert Leger Well No. 1 was drilled on a different lease from that on which the Lucky Strike Well No. 1 was drilled, Grigsby asserts that the production arose from a different "property."

Grigsby is incorrect in stating that "property" is measured solely by the fee or leasehold interest. The focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest. If Grigsby were correct in stating that the nature of the ownership interest alone controlled the definition of "property," a mineral lessee could evade the price control and allocation programs by pooling his interest with that of neighboring lessees and gerrymandering the situs of the well among the various leaseholds.[k]

The "right to produce" arises from a combination of sources, including, but not limited to, the nature of the ownership interest, contractual extension or restriction of ownership interest, and orders of state regulatory agencies. A mineral fee owner has a "right to produce" subject to state law. A mineral leasehold owner has a "right to produce" subject to the terms of the lease and state

[k] The FEA acknowledged that "property" is "generally synonymous with the tract or premises as to which a right to produce exists pursuant to an oil and gas lease." Ruling 1977-1, 42 Fed. Reg. 3628, 3632 (1977). However, the FEA has never stated that "property" is always defined by the lease.

law. The mineral leasehold owner's "right to produce" may be further circumscribed by voluntary or compulsory pooling. Although the fee or leasehold interest may be the origin of the "right to produce," such a "right to produce" is controlled, limited, or extended by contractual agreement and state authorities. Consequently, the mere fact that the Robert Leger Well No. 1 was drilled on a different lease from that on which the Lucky Strike Well No. 1 was drilled did not entitle Grigsby to classify the Robert Leger Well No. 1 production as "new oil" emanating from a different "right to produce."

B. PRODUCTION OUTSIDE THE UNITIZED PREMISES OF THE HEYWOOD SAND, RESERVOIR A, SAND UNIT B?

Grigsby argues that the Robert Leger Well No. 1 production could not have been subject to the same "right to produce" as the Lucky Strike Well No. 1 production, because the orders of the Louisiana Commissioner of Conservation unitizing the Heywood Sand, Reservoir A, Sand Unit B, from which the Lucky Strike Well No. 1 produced did not and could not include within the unitized area the reservoir from which the Robert Leger Well No. 1 produced.

The premise of Grigsby's argument, that unitization is the source of the "right to produce" and, hence, the unitized premises defines the property, is correct where mineral fee or leasehold interests have been aggregated by unitization. The analysis set forth in subsection A, *supra*, supports the premise insofar as it recognizes that contractual agreements and state regulatory agencies modify the "right to produce" which inheres in fee or leasehold ownership. Ruling 1975-15, 40 Fed.Reg. 40832 (1975), expressly stated: "Generally, therefore, since the unit agreement signifies one right to produce crude

oil airising from several leases or fee interests, the unit defines the property." [l]

Grigsby contends that the orders of the Louisiana Commissioner of Conservation unitizing the Heywood Sand, Reservoir A, did not and could not include the Upper Heywood "A" Sand, Reservoir A, from which the Robert Leger Well No. 1 produced. Order No. 464-F-1 issued February 20, 1969, created two drilling and production units to replace the single unit established by Order No. 464, issued May 5, 1959. Order No. 464-F-1, on its face, contemplated the drainage of the single reservoir heretofore defined in Order No. 464 as that sand bearing oil between the depth of 9477 and 9632 feet in the unit well.[m]

Under Louisiana law, the units established by Order No. 464-F-1 could have included only one reservoir. LA.

---

[l] "Determination of new, released and stripper well crude oil for units formed prior to the date on which unit BPCL regulations were adopted (February 1, 1976 for enhanced recovery units and September 1, 1976 for all units) are subject to the provisions of FEA Ruling 1975-15 as modified on February 1, 1976." Ruling 1977-2, 42 Fed. Reg. 4409, 4415 (1977). Under Ruling 1975-15, the BPCL, in the case of a pre-1972 unitization, is the total 1972 monthly production from the unit. In the case of a post-1972 unitization, the BPCL is the total 1972 monthly production from all of the leases that now comprise the unit. We initimate no view on the validity of the promulgation of Ruling 1975-15, since the issue was raised for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

[m] Order No. 464-F-1 might have been misinterpreted by the district court, because Order No. 464, to which reference is made, was not in the record below. Another possible source of confusion is that Order No. 464 defines the reservoir by the depths of a single well, whereas Order No. 464-F-1 established two unit wells. Notwithstanding its imprecise language, Order No. 464-F-1 created two drilling units for one reservoir and force-pooled the leasehold premises participating in each unit.

REV.STAT.ANN. § 30:9(B) (1975) provides in pertinent part: "For the prevention of waste and to avoid the drilling of unnecessary wells, the commissioner shall establish a drilling unit or units for each pool." "'Pool' means an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both." LA.REV.STAT.ANN. § 30:3(6) (1975). Unitization orders must be "upon terms and conditions . . . that will afford the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool." LA.REV.STAT.ANN. § 30:10 (A)(1)(a) (1975).

In hindsight, therefore, Grigsby is correct: the Robert Leger Well No. 1 production was not from the same reservoir, hence unitized premises, as the Lucky Strike Well No. 1 production.

If the Robert Leger Well No. 1 production had been *officially* recognized *at the outset* as production from outside the Heywood Sand, Reservoir A, then the production would be from a "property" distinct from that of the Lucky Strike Well No. 1. The result would be controlled by Ruling 1977-1, 42 Fed.Reg. 3628, 3634 (1977):

> It is not uncommon for less than the total premises subject to a right to produce to be unitized or otherwise aggregated with all or portions of premises subject to other rights to produce, to form a single "property," leaving the balance of the premises formerly subject to a single right to produce not aggregated with any such rights. The portion of the premises which is not aggregated is appropriately recognized as a property separate and apart from the portion of the premises which has been aggregated with other rights to produce.
>
> In some cases, FEA understands that the inclusion of the so-called "Pugh" clause in a lease would operate to create a separate and distinct right to pro-

> duce with respect to the non-unitized portion of the premises subject to that lease by stating that production from the unitized portion of a lease will not serve to fulfill the lessee's production obligations with respect to the non-unitized portion. Thus, the two portions of the lease including such a clause would become separate properties by the terms of the lease itself. However, even where such a clause is not included, FEA has concluded that treatment of the non-unitized portion of the premises as a separate property is appropriate.

Since Order No. 464-F-1 untitized only certain horizontal strata of the various leased premises, the non-unitized remainder of the various leased premises would be "property" separate from the unitized portion of the premises. This interpretation of the federal "property" regulation comports with the Louisiana law of lease cancellation: "production from a nonpooled, or nonunitized stratum is not to be viewed as the equivalent of production from pooled or unitized premises." *LeSage v. Union Producing Co.*, 176 So. 2d 777, 783 (La.Ct.App. 1965), rev'd on other grounds, 249 La. 42, 184 So. 2d 727 (1966); *accord Wilcox v. Shell Oil Co.*, 226 La. 417, 76 So. 2d 416, 418 (1954).

It is beyond dispute that the Robert Leger Well No. 1 production was officially recognized as production beyond the Heywood Sand, Reservoir A, on June 24, 1976, when the Louisiana Commissioner of Conservation issued two orders recognizing two separate reservoirs in the North Jennings Field and unitizing the newly discovered reservoir.[n] The unitization of the Upper Heywood "A" Sand,

---

[n] Order No. 464-F-3 recognized the presence of two reservoirs in the North Jennings Field, in language that was less than crystal clear. The order also continued in effect with some redefinition the two units and the corresponding unit wells for the Heywood Sand, Reservoir A, which had been established in Order No. 464-F-1.

Reservoir A, Sand Unit B, and the designation of the Robert Leger Well No. 1 as the unit well, in Order No. 464-K, gave rise to a new "right to produce" and, thus, a new "property," under Ruling 1975-15. Accordingly, we hold that Grigsby was authorized to charge "new oil" prices for the Robert Leger Well No. 1 production from the Upper Heywood RA SU B as of June 24, 1976.

The official status of the Robert Leger Well No. 1 production from October 14, 1974, until June 24, 1976, is not clearly established by the record or the briefs before us. The need for certainty and finality in the enforcement of price control regulations militate against the retroactive application of Order No. 464-K which defined the Upper Heywood "A" Sand, Reservoir A. For the same policy reasons, any erroneous treatment of the Robert Leger Well No. 1 production as production from the Heywood Sand, Reservoir A, will not be retroactively corrected.[o]

We remand the case to the district court for consideration of the official status of the Robert Leger Well No. 1 production from October 14, 1974, until June 24, 1976. On remand, Grigsby bears the burden of proving that the Robert Leger Well No. 1 production was not treated as production from the Heywood Sand, Reservoir A, for the period in question. The burden rests with Grigsby so that the DOE may, in enforcing price control regulations, rely upon the treatment of production as well as the official designations made by state regulatory agen-

---

[o] It would have been reasonable to erroneously treat the Robert Leger Well No. 1 production as production from the Heywood RA SU B, given that the Upper Heywood "A" Sand, Reservoir A, was separated from the Heywood Sand, Reservoir A, by only 11 feet in the Robert Leger Well No. 1. The probability that the subsurface stratum was not completely horizontal would increase the risk that the two reservoirs might be mistaken for one reservoir.

cies.[9] Order No. 464-F-2, issued July 26, 1974, denominated the Robert Leger Well No. 1 as the "substitute unit well" for the Heywood RA SU B after the Lucky Strike Well No. 1 began to produce salt water. The "substitute unit well" status apparently continued until the orders of June 24, 1976 were issued. Order No. 464-F-2 provided that "all pertinent provisions of the 464-F Series of Department of Conservation orders and the units created thereby are continued in effect." Among the provisions of Order No. 464-F-1 was the following:

> The separately owned tracts, mineral leases and other property interests within the units established herein are hereby pooled, consolidated, and integrated in accordance with Section 10, Title 30 of Louisiana Revised Statutes of 1950, with each tract sharing in unit production in the proportion that the surface area of such tract bears to the entire surface area of said unit. Also, all operations on and production from such unit shall be considered operations on and production from each of the separate tracts within said units and under the terms of each of the mineral leases affecting said tracts.

If the production from the Robert Leger Well No. 1 were apportioned among the lessees who shared an interest in the Heywood RA SU B, in accordance with the

---

[9] The circuitous argument that the Robert Leger Well No. 1 production was not treated as Heywood RA SU B production, because "new oil" prices were charged for the Robert Leger Well No. 1 production will, of course, be of no avail to Grigsby. "Treatment" refers to whether or not the production was allocated according to a pooling agreement or order. If the treatment of production by the parties in interest is inconsistent with state law, state law in tandem with federal policy will guide the FEA and its successor, the DOE. If a state agency's order is inconsistent with its prior practice or state law, federal policy alone will control.

above pooling order, then the production should have been classified as "old oil." [q]

The *amicus curiae* reply brief for the State of Louisiana on rehearing declares that "any production from the higher reservoir must be attributable to the [Leger] leasehold." The responsive brief for the DOE, on the other hand, alleges that Grigsby paid "*pro rata* shares [of the Robert Leger Well No. 1 production] to the [Heywood RA SU B] . . . parties in interest." Even if Grigsby proves that the Robert Leger Well No. 1 production was not subject to pooling between October 14, 1974, until June 24, 1976, he must reconcile such treatment with the "substitute unit well" designation in Order No. 464-F-2 to the satisfaction of the district court in order to prevail in his claim that the Robert Leger Well No. 1 production was "new oil" for the time period in question. The district court rendered summary judgment for the FEA with respect to the Robert Leger Well No. 1 production prematurely and upon clearly erroneous findings.

SUMMARY JUDGMENT AND CONCLUSION

Grigsby argues that the district court erred in granting the FEA's motion for summary judgment, because there was a genuine dispute of material facts which would be determinative of the court's decision if resolved in favor of the FEA. *See Mobil Oil Corp. v. FEA*, 566 F.2d 87, 92 (Em.App. 1977).

---

[q] If a voluntary pooling agreement was in effect among the lessees who shared an interest in the Heywood RA SU B, between October 14, 1974, and June 24, 1976, Grigsby will bear the burden of proving that any apportionment of production among the lessees was pursuant to the voluntary pooling agreement rather than the compulsory pooling provision in Order No. 464-F-1.

We affirm the district court's grant of FEA's motion for summary judgment with respect to the West Pontchartrain Field. The ceiling price for the oil produced from the West Pontchartrain Field should be set at the same price as that posted for oil in the Shell Good Hope Field for oil between 37° and 37.9° gravity, $3.94 per barrel.

We reverse the district court's grant of FEA's motion for summary judgment with respect to the North Jennings Field and remand for further proceedings consistent with this opinion. Upon remand, the sole issue before the district court will be whether the production from the Robert Leger Well No. 1 from October 14, 1974, until June 24, 1976, should be deemed production from the Heywood Sand, Reservoir A, Sand Unit B. Attention should be directed to the official designation of the Robert Leger Well No. 1 as a "substitute unit well" for the Heywood Sand, Reservoir A, Sand Unit B, and any pooling of the well's production.

Affirmed in Part, Reversed and Remanded in Part.

APPENDIX C

ORDER GRANTING REHEARING

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-28

Jack W. Grigsby,
Appellant,

v.

Department of Emergy,
James R. Schlesinger, and
The United States of America,
Appellees.

BEFORE HOFFMAN, INGRAHAM AND GEWIN, JUDGES.

We grant the Petition of the Appellant, Jack W. Grigsby, for rehearing.

The motions of Texaco Inc., Exxon Corporation, Texas Independent Producers & Royalty Owners Association, and Energy Consumers & Producers Association, for leave to file briefs as Amici Curiae are granted.

The Appellees, Department of Energy, James R. Schlesinger and The United States of America, are granted thirty (30) days, from the date of this order, to respondent.

FOR THE COURT:
Ruth H. Jacobson
Clerk

By: s/ Donna M. Bold
Donna M. Bold
Chief Deputy Clerk

May 22, 1978

APPENDIX D

Temporary Emergency Court of Appeals of the United States

No. 5-28

JACK W. GRIGSBY, APPELLANT,

v.

DEPARTMENT OF ENERGY,
JAMES R. SCHLESINGER and
THE UNITED STATES OF AMERICA, APPELLEES.

Appeal from the United States District Court
for the Western District of Louisiana

(Civil No. 77-0258)

(Argued January 6, 1978 Decided May 2, 1978)

H. H. HILLYER, JR., with whom J. Henry Phillips III, Milling, Benson, Woodward, Hillyer & Pierson, New Orleans, Louisiana; and W. Michael Adams, Blanchard, Walker, O'Quin & Roberts, Shreveport, Louisiana, were on the brief for the Appellant.

LINDA L. PENCE, with whom Barbara Allen Babcock, Assistant Attorney General and Dennis G. Linder, Department of Justice, Washington, D.C., were on the brief for the Appellees.

Before HOFFMAN, INGRAHAM and GEWIN, Judges.

INGRAHAM, Judge.

The Federal Energy Administration (FEA) instituted this action against Jack W. Gribsy, an independent oil operator, following FEA audits on two of Grigsby's properties. The ensuing Notice of Probable Violation (NOPV) accused Grigsby of charging prices for crude oil produced

from these two properties in excess of the limits set by the Emergency Petroleum Allocation Act of 1975 (Act) and its implementing regulations. The NOPV ripened into a remedial order. Grigsby sued in United States District Court for the Western District of Louisiana for review of the FEA action and for injunction. The district court upheld the FEA remedial order, dismissed Grigsby's complaint and ordered him to comply with the FEA remedial order. The alleged violations present us with two issues of first impression under the Act. We affirm the district court on both issues.

Since the initiation of this suit by the FEA, the agency as it was constituted has been abolished. As of October 1, 1977, pursuant to the Department of Energy Organization Act, 42 U.S.C. §§ 7701, et seq. (Supp. III 1977), and Executive Order 12009, 42 Fed. Reg. 46267 (1977), the FEA and its functions were transferred to the Department of Energy (DOE), of which James R. Schlesinger is Secretary. Pursuant to Rule 43(c), Federal Rules of Appellate Procedure, the DOE and James G. Schlesinger are hereby substituted as appellees for the FEA and Administrator O'Leary.

The two properties upon which Grigsby purportedly violated the Act are both located in the State of Louisiana—one in the North Jennings Field, Acadia Parish, and the other in the West Pontchartrain East Block 41 Field, St. Charles Parish. Because the question of whether Grigsby overcharged his customers in each of the two fields is based upon a different legal issue, we will discuss each field separately.

THE NORTH JENNINGS PROPERTY

Grigsby operated the Heywood RA SUB Unit located in the North Jennings Field. The unit was created on January 22, 1969, by Order No. 464-F-1 of the Commis-

sioner of Conservation of the State of Louisiana. The Commissioner's order pooled five separately owned tracts and leases within the unit area and designated Lucky Strike Well No. 1 as the unit well. In accordance with state law, the unit order provided that the production from the unit would be allocated among the leases comprising it.

After a period of substantial production, the Lucky Strike Well began to produce excessive salt water, so Grigsby applied to the Louisiana Department of Conservation for permission to drill a substitute well for the same unit. By Order No. 464-F-2, dated July 26, 1974, the Commissioner authorized Grigsby to drill a new well in the unit to be called the Robert Leger Well No. 1. Completed on a different tract of the unit, the new well began production on October 14, 1974. In the same month, Grigsby terminated crude oil production from the Lucky Strike well and closed it. From October 14, 1974 until the present, production of crude oil from the Heywood Sand has been obtained by production from the Robert Leger well.

On June 24, 1976, the Commissioner of Conservation determined that the Robert Leger well was completed in a stratigraphically higher reservoir, not in communication with the reservoir from which the Lucky Strike well produced oil. For this reason, the Commissioner issued Order No. 464-K, which redefined the Heywood Sand as being comprised of two separate reservoirs, the Heywood Sand, Reservoir A, and the Upper Heywood "A" Sand. Reservoir A. The order dissolved the Heywood RA SUB Unit, creating in its stead the Upper Heywood "A" RA SUB Unit. Grigsby remained the operator of the Upper Heywood Sand, and the tracts covered by the five mineral leases continued to be pooled. This case arose when Grigsby treating all production from the Robert Leger well as "new oil" under FEA regulations, charged upper tier prices for the oil produced from the well.

On November 29, 1976, the FEA issued a remedial order to Grigsby for violations of Cost of Living Council Phase IV Petroleum Price Regulations, 6 C.F.R. § 150.353 (1974) and FEA Petroleum Price Regulations, 10 C.F.R. § 212.73 (1977). The FEA had determined that Grigsby had overcharged Cities Service Oil Company and Cities Service Pipeline Company by billing them at "new oil" prices instead of "old oil" prices beginning on October 14, 1974, and continuing until the date of the remedial order. Grigsby was ordered to reduce prices charged for crude oil produced from the North Jennings properties immediately, so that prices conformed to the FEA's interpretation of 10 C.F.R. §§ 212.73 and 212.74 (1977), and to refund past overcharges with interest to Cities Service.[1]

On December 11, 1976, Grigsby filed an appeal of the remedial order with the FEA's Office of Exceptions and Appeals. The remedial order was essentially upheld, although the amount of some overcharges was reduced.[2]

---

[1] The court found the overcharges to total $342,742.43. Of this amount, $46,092.81 represents excess severance tax paid to the State of Louisiana by the buyer because of the overcharge on the price of the oil. Grigsby argued below that he should not have to refund this excess amount of tax to the purchasers, but the trial court rejected his argument. Since Grigsby does not forward this contention on appeal, we need not explore the rationale behind the trial court's finding.

[2] The remedial order had directed Grigsby to refund amounts in excess of the ceiling price for old oil on the Heywood property for the period from October 14, 1974 until December 1, 1976, and to continue to charge old oil prices into the future. The appeal decision of the FEA reversed the remedial order insofar as calculation of lawful prices after September 1, 1976 is concerned. On that date, the FEA amended the term "property." As amended, the regulation reads:

> A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory au-

Grigsby then appealed the FEA action in the United States District Court.[3] The court granted the FEA's motion for summary judgment upholding the FEA orders. The court also entered partial summary judgment in favor of the FEA on its counterclaim, ordering Grigsby to comply with the FEA remedial order as modified by the appeal decision and order.[4] Grigsby has duly per-

---

thority as a producing formation that is separate and distinct from and not in communication with, any other producing formation.

10 C.F.R. 212.72 (1977); *see also* Ruling 1977-2, 42 Fed.Reg. 4409 (1977). The FEA was convinced that the reservoir from which Grigsby was currently producing crude oil (Upper Heywood Sand, Reservoir A) was separate and distinct from the reservoir from which Grigsby was producing crude oil prior to October 14, 1974 (Heywood Sand, Reservoir A). Grigsby was accordingly authorized to charge new oil prices after September 1, 1976.

[3] Grigsby predicated jurisdiction upon two grounds. First, Grigsby asserted that the action arose under the laws of the United States and exceeded $10,000. 28 U.S.C. § 1331 (Supp. 1977). Among the United States laws implicated were the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977); the Federal Energy Administration Act, 12 U.S.C. §§ 761-786 (1976); the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §§ 751-760h (1976); and the Administrative Procedure Act, 5 U.S.C. § 703 (Supp. 1977).

Additionally, Grigsby based jurisdiction upon § 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, incorporated by reference into the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. § 754 (1976).

[4] The district court did not enter summary judgment on the two remaining issues in the counterclaim at this time. One of these issues concerned the revised remedial order issued on April 22, 1977, with respect to the Pontchartrain property to be discussed later in the opinion. At the time, this revised order was not in the record. Summary judgment was entered affirming this order on November 16, 1977.

The other issue involved civil penalties against Grigsby and will eventually require a full evidentiary hearing.

fected this appeal.[5]

Because Grigsby is an operator of crude oil producing properties, he is subject to the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §§ 751-760h (1977), as well as the DOE regulations promulgated thereunder. These regulations spell out the two-tier crude oil pricing system, a pricing program which we have discussed and upheld on a number of occasions. *See, e.g., Griffin v. United States*, 537 F.2d 1130 (Em.App. 1976); *Cities Service Company v. FEA*, 529 F.2d 1016 (Em.App. 1975); *Consumers Union v. Sawhill*, 525 F.2d 1068 (Em.App. 1975).

The two-tier pricing system was established in August, 1973, pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977). The implementing regulations were first promulgated by the Cost of Living Council, *see* 6 C.F.R. §§ 150.353 and 150.354 (1975), later adopted by the FEA, and are now enforced by the DOE. They provide that "old oil" not be sold above the lower tier ceiling price, 10 C.F.R. § 212.73 (1977), and that "new oil" not be sold above the upper tier ceiling price, 10 C.F.R. § 212.74 (1977). Because the upper tier ceiling price is based upon the highest posted price on September 30, 1975,[6] and the lower tier ceiling

---

[5] This court has jurisdiction by virtue of 15 U.S.C. § 754 (a)(1), which incorporated § 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977).

[6] 10 C.F.R. § 212.74(b) (1977). This section provides that:

> (b) *Upper tier ceiling price determination.* The upper tier ceiling price for a particular grade of domestic crude oil in a particular field is (1) the highest posted price on September 30, 1975, for transactions in that grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; less (2) $1.32 per barrel.

price is based upon the highest posted price on May 15, 1973,[7] the upper-tier price works to the advantage of the seller of crude oil.

Crude oil is treated as "new oil" to the extent that it exceeds the 1972 level of production of the *property* from which it was produced.[8] The threshold inquiry in determining the amount of new oil produced from a premises is therefore whether the premises is a *property* that produced oil in 1972. This question can be answered only

---

[7] 10 C.F.R. 212.73(b) (1977). This section provides:

> (b) *Lower tier ceiling price determination other than in Alaska and California.* The lower tier ceiling price for a particular grade of domestic crude oil in a particular field other than in Alaska or California is the sum of: (1) The highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; plus (2) $1.35 per barrel.

[8] This proposition can be deduced only after a journey through the intricate labyrinth known as the DOE regulations. The regulations define "new crude oil" prior to February 1, 1976 as the domestic crude oil production sold in a specific month, less (A) the base production control level for that month, and less (B) the current cumulative deficiency. 10 C.F.R. § 212.72 (1977). For our purposes, "current cumulative deficiency can be ignored."

"Base production control level," however, is important to the definition. The regulations define this term in relation to crude oil sold before February 1, 1976 as essentially the number of barrels of domestic crude oil produced and sold from that property in the same month of 1972. By fusing the definition of "new crude oil" and that of "base production control level," it can be seen that new crude oil before February 1, 1976 is basically the number of barrels of oil produced in a month, minus the number of barrels produced on that same property during that same month in 1972.

through applying the definition of the term "property." The regulations define "property" as "the right which arises from a lease or from a fee interest to produce domestic crude oil." 10 C.F.R. § 212.72 (1976). Two interpretations of this definition by the FEA are relevant to the present suit.[9]

Ruling 1975-15 was the first FEA attempt to clarify the definition of the term "property." The ruling emphasized the "right to produce" language in the definition, then addressed the application of the definition to unitized properties. The ruling explained that "since the unit agreement signifies one right to produce crude oil arising from several leases . . . the unit defines the property." 40 Fed.Reg. 40832 (1975).

The next FEA attempt to interpret the definition of "property" occurred in 1977 with Ruling 1977-1, 42 Fed.Reg. 3628 (1977). In this ruling, the FEA recognized that the term "property" connoted the "surface acreage" or "tract" to which a producer obtained production rights through an oil and gas lease. *Id.* at 3631. The ruling then focused upon the relationship of the oil and gas lease to property:

> Inasmuch as the lease is the basic document of the oil and gas industry, there should have been no doubt but that CLC [Cost of Living Council] intended by its definition of property to signify the premises described by an oil and gas lease . . . .

Id. at 3632.

By purportedly applying these rulings, along with the definition of property, the FEA found that the produc-

---

[9] Ruling 1977-2, clarifying the definition a third time, was issued after the September 1, 1976 amendment which called for separate reservoirs to be treated as separate properties. *See* note 2, *supra*. Because no question is raised in this appeal concerning the definition of "property" after this date, we need not discuss Ruling 1977-2.

tion of the Robert Leger well from the Upper Heywood Sand, Reservoir A, was from the same property as that of the Lucky Strike Well from the Heywood Sand Reservoir. The production from the Robert Leger well was therefore "old oil" and subject to lower tier prices. It was upon this determination that the FEA concluded, and the trial court agreed, that Grigsby overcharged Cities Service by billing it at upper-tier prices.

On appeal, Grigsby does not dispute the validity of the regulation which defines the term "property," nor does he challenge the two-tier price system. Grigsby instead contests the FEA rulings which have explicated the rudimentary definition of "property" that appears in the regulations.

Grigsby argues that in 1974, when he had to decide whether the production from the Robert Leger well was from the same or from a different property than that from the Lucky Strike well, he had only the definition set out in the regulations to follow. He contends that he read the definition literally—that "property" was the "right which arises from a *lease* . . . ." 10 C.F.R. § 212.72 (1976) (emphasis added). Since the Robert Leger well was drilled on a different lease, Grigsby assertedly believed that he was justified in treating production from the lease as being from different property.

Of the two rulings relied upon by the FEA and by the court below, Grigsby directs the brunt of his attack against Ruling 1975-15. He maintains that the ruling is inconsistent with the definition of property and with Ruling 1977-1 to the extent that Ruling 1975-15 held that a unit composed of several leases defines the property. Where unitization exists, according to Grigsby, Ruling 1975-15 expanded the definition of "right to produce." 10 C.F.R. § 212.72 (1976), by extending the breadth of this right from the lease to the multi-lease unit. See 40 Fed. Reg. 40832 (1975).

The standard for review of administrative action, being one which this court has repeatedly discussed, need not be elaborated upon here. The foundation of the standard is § 211(d)(1) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977), which by virtue of § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1), governs our review of the FEA's action. The Act provides that no regulation be set aside unless the "issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful . . . ." *Texaco, Inc. v. FEA*, 531 F.2d 1071, 1076-77 (Em.App. 1976); *Pasco, Inc. v. FEA*, 525 F.2d 1391, 1400-01 (Em.App. 1975). The arbitrary or capricious standard requires us to uphold the issuance of a regulation if upon consideration of relevant factors, there was no clear error of judgment and there is a rational basis for the conclusions approved by the administrative body. *Texaco, Inc. v. FEA, supra*, at 1076-77. *See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974). The burden of persuasion lies on the party contesting the validity of the regulation. *Pasco, Inc. v. FEA, supra*, at 1401; *Condor Operating Co. v. Sawhill*, 514 F.2d 351, 359 (Em.App.), *cert. denied*, 421 U.S. 976 (1975).

In the present case, no regulation is challenged. Instead, Grigsby contests an FEA ruling, which in effect is an interpretation by the FEA of its own regulation. The Supreme Court has articulated the following standard for review of an agency interpretation of its own regulation:

> When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. Since this involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion

> is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Udall v. Tallman, 380 U.S. 1, 16-17 (1965). *See, e.g., University of Southern California v. Cost of Living Council*, 472 F.2d 1065, 1069 (Em.App. 1972).

We now proceed to apply this standard to determine the validity of Ruling 1975-15. At the outset, we must concede that the regulation defining "property" which this ruling seeks to interpret, suffers from a severe case of unartful drafting. It is therefore necessary for us to try to divine the intent of the drafters of the regulation. The regulation defines property as "the right which arises from a lease or from a fee interest. . . ." 10 C.F.R. § 212.72 (1976). We do not believe that the reference to "*a* lease or *a* fee interest," *id.* (emphasis added), in the singular necessarily indicates a desire on the part of the drafters to limit the definition of property to the right to produce arising from *one* lease or *one* fee interest. We believe that the drafters were seeking instead to delineate in specific language the type of oil interests which should be encompassed in the definition. This conclusion flows from the fact that the drafters excluded several oil interests such as the royalty interest and the executory interest, while including the fee interest, an interest which is not as common a producing interest as the oil lease, but which deserves to be given the same treatment as the lease.

We therefore believe that the FEA was not arbitrary or capricious, or clearly erroneous when it stated in Ruling 1975-15 that a unit of several leases could define the property. See 40 Fed.Reg. 40832 (1975). Unitization normally results in the alteration of producing patterns and often distorts actual production from any one lease comprising the unit. It would therefore be impractical, if not impossible, to focus on each lease in a unitized property.

To allow the unit to define the property, on the other hand, is consistent with both the language of the definition and the purposes of the Act. Though the entire unit signifies only one right to produce, each leaseholder still claims a portion of that right through his lease in the unit. Therefore, the requirement of the definition that property be a right to produce which arises from the lease is satisfied. Because the unit defines the property, it makes no difference if the producing well is moved from one lease to the next. Neither the right to produce from the unit nor one leaseholder's portion of that right to produce changes.

Grigsby argues that Ruling 1975-15 conflicts with Ruling 1977-1. According to Grigsby, Ruling 1977-1 counsels that the term "property" should always be equated with the term "lease." We must also reject this argument. A close reading of the ruling reveals that "property" is "*generally* synonymous with the tract or premises as to which a right to produce exists pursuant to an oil and gas lease. . . ." [10] 42 Fed.Reg. 3628, 3632

---

[10] Grigsby also cites to another passage which appears in this ruling:

> Inasmuch as the lease is the basic document of the oil and gas industry, there should have been no doubt but that CLC [Cost of Living Council] intended by its definition of property to signify the premises described by an oil and gas lease. . . .

42 Fed.Reg. 3628, 3632 (1977). Grigsby attaches great significance to the tone of absoluteness in the statement—concluding that the statement supports the contention that a lease is always equivalent to the term "property." We believe this reliance to be displaced, however, because of the caveat in the footnote appending the statement. The footnote reveals that the statement was meant only to apply to the great majority of instances. *Id.* at 3632 n.3. The FEA has indicated its

(1976). We agree that in most instances, the lease defines the property. In those cases where leases are pooled, however, the two terms cannot be equated. Ruling 1977-1 recognizes this fact, by incorporating by reference the discussion of the treatment of unitized leases from Ruling 1975-15. *Id.* at 3634.

In sum, we hold that Ruling 1975-15 is a rational interpretation of the definition of "property" that appears in the DOE regulations, and that the ruling is not inconsistent with Ruling 1977-1, insofar as treatment of unitized properties is concerned. Therefore, the fact that the Robert Leger well was drilled on a different lease from the Lucky Strike well does not of itself signal that the Robert Leger well was drilled on different property.

Grigsby argues in the alternative that the redefinition of the unit by the Commissioner of Conservation from the Heywood RA SUB to the Upper Heywood "A" RA SUB created a new right to produce, thereby rendering the production from the Robert Leger as production from a different property. According to Grigsby, the right to produce flows from the state conservation permits and forced pooling orders covering the two wells. The operator of the Robert Leger well has a right to produce only from the Upper Heywood "A" Sand, Reservoir A. Grigsby contends that this right, derived from the forced pooling order covering that reservoir, is a wholly different right to produce than the right derived from the

---

intention not to be tied to a wooden interpretation of the term "property":

> FEA has determined that the clarification of past applications of the property concept should recognize more flexibility because of a variety of circumstances under which an interpretation of the term property that was limited to the literal meaning of the language of the definition would be inequitable.

Id. at 3632-33.

order creating the Heywood Sand, Reservoir A. The fact that Grigsby is the operator in each instance and that the same leases are included in each unit is coincidental.

Ruling 1975-15 put producers on notice that the definition of the term "property" cannot be construed "to mean that production from separate reservoirs subject to the same working interest would, simply by virtue of the fact that the several reservoirs have been developed and produced separately be regarded as production from separate properties." 42 Fed.Reg. 3628, 3634 (1975). At the same time, however, the ruling recognized that in special instances "it would have been impracticable or inequitable for producers not to have treated separately production from a separate reservoir or reservoirs." *Id.* Neither the FEA statutes or the implementing regulations prescribe treatment for a multi-reservoir right to produce. We can therefore discern no reason which would compel the FEA to treat separate producing reservoirs as per se different rights to produce. The FEA has rationally resolved the problem of separate reservoirs, and we accordingly hold that its interpretation of the term "property" is not clearly erroneous.[11]

---

[11] The FEA explained its decision not to treat separate producing reservoirs as separate properties in the following manner:

> [A]ny producer which adopted a reservoir-by-reservoir approach to the definition of property (and, hence, to the computation of amounts of "new" and "released" crude oil) would typically have been in a position to achieve greater benefits under the price regulations over the past three years than those producers who took the approach of aggregating production from all reservoirs subject to the same right to produce, as required under the regulations. At least until February 1, 1976, any producer that treated each reservoir as a separate property automatically would have obtained "new" crude oil whenever production was obtained from a new reservoir. Producers using the lease approach, on the other hand, were re-

The FEA did not apply the ruling in an arbitrary and capricious manner to the separate reservoirs involved in this case. Though there are instances in which two reservoirs such as the Heywood Sand, Reservoir A and the Upper Heywood "A" Sand, Reservoir A, should constitute separate properties, this is not such a case. Order 464-F-1, which created the original Heywood RA SUB Unit, did not limit the unit to a specific reservoir. For the purposes of the Emergency Petroleum Allocation Act, the order therefore created one right to produce which covered all the reservoirs existing beneath the surface of the unit.

Order 464-K, which redefined the Heywood Sand as being composed of two reservoirs, created a new unit for the upper sand and abolished the old unit which had been producing from the lower sand. Again, regardless of the state law effect of the order, for the purposes of the federal energy laws the order merely partitioned the Heywood sand into two units, each with its own reservoir, abolished one of the units, and kept the other viable. We do not accept Grigsby's argument that the division of the Heywood Sand created two properties where only one previously existed. The Robert Leger well produced from the same property as the Lucky Strike well in spite

---

quired first to exceed 1972 levels of production from the lease concerned before any production from a new reservoir would be regarded as "new" crude oil. FEA has unfortunately not been able to obtain any approximation of the extent to which producers have actually adopted a reservoir-by-reservoir definition of property.

Under these circumstances, FEA has concluded that it would be inequitable to permit producers who took an expansive--and, in FEA's view, unwarranted—view of the meaning of the term property to obtain benefits that were not afforded to producers who adhered closely to the regulations.

Ruling 1977-1, 42 Fed.Reg. 3628, 3634 (1977).

of the fact that it produced from a different reservoir pursuant to a different state conservation permit order.

In conclusion, we hold that the trial court was correct in deciding that the Robert Leger well was drilled on the same "property" as the Lucky Strike well, and that therefore the oil produced from the Robert Leger should have been sold at lower-tier prices.

West Pontchartrain Property

Grigsby is also the operator of a crude oil producing property known as the WLPE 41 7600′ SU in the West Pontchartrain East Block 41 Field (Pontchartrain Field). Like the North Jennings property, the dispute from this field arises out of the two-tier pricing system; unlike the North Jennings property, both parties agree that the oil produced in this field is "old oil." The dispute instead concerns how that "old oil" is to be priced.

As we discussed earlier, DOE regulations set the ceiling price for "old oil" as of May 15, 1973. On this date, Grigsby's Pontchartrain property was not named in any price bulletin. Grigsby was selling the production from this property to Shell Oil Company under a written contract executed on June 11, 1971, but amended twice since that date.[12] The current provision provided for a

---

[12] As originally executed, the contract bound Grigsby to sell the Pontchartrain production to Shell at a price per barrel equal to Shell's posted price for oil of like gravity produced in the Good Hope Field, less transportation costs provided by Shell from the Pontchartrain Field to Shell's facilities. At the time, the posted price was $3.69 per barrel for 37.0°-37.9° crude oil. Shell paid this sum minus 12¢ per barrel for transportation costs, or $3.57 per barrel.

The contract between Grigsby and Shell was amended on two different occasions prior to May 15, 1973. On July 1, 1972, the parties agreed to a flat price of $3.57 per barrel. According to Shell, the flat price did not represent a price

flat price of $3.75 per barrel, to fluctuate with any changes in the arithmetical average of the prices posted for 40° gravity crude oil by producers in four nearby fields.[13] On May 15, 1973, each of the firms operating the four fields had issued price bulletins providing for a posted price of $4 per barrel for 40.0° gravity crude oil, less 2¢ per degree reduction for each full degree of gravity below 40.9°.

Though the price of the oil from the referenced fields fluctuated with the grade of the crude oil produced, Grigsby's contract was drafted in such a manner that Pontchartrain oil was sold at the same price regardless of its grade. That price was the price of the 40° gravity oil from the referenced fields.

During the period covered by the FEA audit, Grigsby charged Shell the price specified in the contract. The oil sold during this period was between 37° and 37.9° gravity. Shell paid $4 per barrel for this oil while oil of the same grade from the nearest field was selling for $3.94 per barrel.

In the same remedial order setting forth the alleged violations on the North Jennings property, the FEA challenged Grigsby for charging $4 per barrel of crude oil sold from the Pontchartrain property. Both Grigsby and the FEA agreed that there was no posted price in the field and that therefore the related price controlled. The parties disagreed, however, as to how the related price should be determined. Grigsby argued that the re-

---

change, but merely eliminated reference to gravity or transportation. The price was finally amended on April 12, 1973 by letter. The terms of this final contractual provision are the same as those discussed in the text above.

[13] The referenced prices were those posted by Shell for Good Hope Field, Texaco for Caillou Island Field, Exxon for Avery Island Field, and Gulf for Delta (Ostrica) Field.

lated price was the price stated in the contract between Shell and Grigsby.

The FEA rejected this argument and instead found that the related price was the posted price in the nearest field for oil between 37° and 37.9° gravity. Since the nearest field was the Shell Good Hope Field, and oil of this grade was selling in the Shell field for $3.94 per barrel, the FEA found $3.94 per barrel to be Grigsby's base price. The FEA subtracted another 12¢ per barrel from this price because Shell had paid for its own transportation costs,[14] setting Grigsby's lawful price at $3.82 per barrel. Grigsby was accordingly directed to refund overcharges made to Shell Oil Company, Stone Energy Company and Summit Gas Company from August 1, 1975 until January 31, 1976,[15] as well as to reduce the price of oil produced on the Pontchartrain property to a level consistent with the FEA's interpretation of 10 C.F.R. §§ 212.73 and 212.74 (1977).

The March 8, 1977, appeal decision agreed with the remedial order that the applicable price for the Pontchartrain oil was the price for the same grade of oil sold in the Good Hope Field. The appeal decision, however, did not agree that the 12¢ transportation charge should be subtracted from Grigsby's ceiling price.[16] The remedial

---

[14] The June 11, 1971 contract described in footnote 12, *supra*, provided that Shell would pay Grigsby for the Pontchartrain oil a price equal to Shell's posted price for the Good Hope Field, less transportation costs provided by Shell from the Pontchartrain Field to Shell's facilities. The FEA apparently believed that this provision was still in effect.

[15] According to the remedial order, Grigsby had overcharged Shell by $25,322.04, Stone by $14,070 and Summit by $12,-154.11.

[16] In the appeal decision, the FEA found no basis for the conclusion that the transportation was being provided by Shell on May 15, 1973. Furthermore, there was no provision in

order was remanded for a recomputation of the overcharges, using a ceiling price of $3.94 per barrel. The revised remedial order, issued on April 22, 1977, provided for restitution of $17,681.25 to the three companies. This revised order was affirmed on partial summary judgment by the trial court on November 16, 1977.

When a price is posted for an oil field, the ceiling price for the oil produced in that field is the sum of the highest posted price for the same grade of crude oil in the same or nearest field on May 15, 1973, plus $1.35. 10 C.F.R. § 212.73 (1977). If there are no posted prices in that field, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted controls. 10 C.F.R. § 212.73 (1977). The parties agree that no price was posted in the Pontchartrain Field on May 15, 1973, and that therefore the related price controls. Because the related price for oil from the Pontchartrain Field is based upon the posted price of oil in the nearest field, our inquiry focuses upon the determination of this posted price. The concept of "posted price" is one which has been utilized in the crude oil market for some time. The definition of "posted price" promulgated by the Cost of Living Council on November 30, 1973, see 38 Fed.Reg. 33577, 33578 (1973), was later adopted by the FEA without alteration and remains virtually unchanged today:

> "Posted price" means a written statement of crude petroleum prices circulated publicly among sellers and buyers of crude petroleum in a particular field

---

the contract in effect on May 15, 1973 for reimbursing transportation charges provided by Shell. The provision to this effect which had existed in the June 11, 1971 contract between the parties had been superseded by the contract on June 11, 1972, which did not provide for reimbursement of transportation costs.

> in accordance with historical practices, and generally known by sellers and buyers within the field.

42 Fed.Reg. 3628, 3635 (1977).

The trial court agreed with the FEA that the nearest field for which prices were posted was the Good Hope Field. The prices in effect in this field were posted in a bulletin of general circulation on May 15, 1973. The price charged for oil between 37° and 37.9° gravity, the grade of oil produced in the Pontchartrain Field, was $3.94 per barrel. It was upon this price that the trial court relied in ruling that Grigsby had overcharged Shell by 6¢ per barrel.

Grigsby's contention earlier and now on appeal is that the price set by the contract in effect between Shell and Grigsby on May 15, 1973, constitutes the posted price for the Shell Field and, therefore, the related price for the Pontchartrain Field. The Shell price bulletin in effect on May 15, 1973, provided that "subject to the terms and conditions of its division orders and other contracts," Shell would pay the prices specified in the bulletin. Grigsby seizes upon the language "subject to the terms . . . of its . . . contracts" to argue that the bulletin adopts the contract price by express reference. According to Grigsby, the contract price serves as the posted price for the Shell Good Hope Field and is therefore the related price for the Pontchartrain Field.

We believe that Grigsby's contention on this issue lacks merit. In FEA Ruling 1977-1, the FEA noted that:

> [O]ther than the published price bulletins of the type traditionally issued by major oil companies, FEA will only recognize as a 'posted price' written offers to purchase only so long as they were bona fide public offers of general applicability to crude oil producers in the field.

42 Fed.Reg. 3628, 3635 (1977). The ruling goes on to state that a written contract will not qualify as a posted

price "because it represents an agreement between a buyer and specific producer, not a bona fide offer to purchase from all producers." *Id.* This test easily meets a threshold standard of rationality. It furthers the DOE policy to maintain the general availability of posted prices by permitting both producers and purchasers to determine applicable ceiling prices for a given grade of oil produced from a particular field. Because posted prices are a matter of public record, and thus generally available, they help produce the desired uniformity for purposes of maintaining equitable prices pursuant to § 4(b)(1)(F) of the Emergency Petroleum Allocation Act.

The requirement that posted price be *bona fide* offers to all purchasers serve another purpose also. The use of such prices eliminates the inherent inequities of contractual prices which normally involve numerous other bargaining factors. For these reasons, we hold that the contract price cannot serve as the related price for the purposes of the ceiling for Grigsby's Pontchartrain oil. Therefore, the ceiling price for the Pontchartrain oil was the posted price in the Shell Good Hope Field, or $3.94 per barrel. The trial court was correct in finding that Grigsby had overcharged Shell by $17,681.25.

Summary Judgment and Conclusion

Grigsby finally asserts that summary judgment should not have been entered on behalf of the FEA because genuine issues of material fact exist that must be resolved by a formal evidentiary hearing. It is clear that no genuine issues of fact exist.[17] The issues argued on

[17] For example, Grigsby argues that he should be allowed to establish that the Robert Leger Well was drilled on a different lease. We, however, do not believe this is a material fact issue for the reasons that we have set out in the text

this appeal are legal, not factual issues, and are dispositive of the outcome of the case. As we recently stated in *Mobil Oil Corp. v. FEA*, 566 F.2d 87, 92 (Em.App. 1977), "[t]o preclude summary judgment the disputed facts must be material" and "must affect the outcome of the litigation." There are no material issues left to be resolved in this case.

In conclusion, we hold that the trial court was correct in upholding the FEA action on both properties. Grigsby should have charged old oil prices on the production from the Robert Leger well for it was drilled on the same property as the Lucky Strike well. With respect to his Pontchartrain property, the ceiling price for the oil produced should have been set at the same price as that of the oil posted in the Shell Good Hope Field for oil between 37° and 37.9° gravity, or $3.94 per barrel.

The judgment of the district court is AFFIRMED.

---

above—that Grigsby's unitized property is one property even if the Robert Leger Well was drilled on a different lease.

APPENDIX E

PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Filed: Jan. 24, 1978

JACK W. GRIGSBY

versus CIVIL ACTION NO. 77-0258

FEDERAL ENERGY ADMINISTRATION,
et al.

PARTIAL SUMMARY JUDGMENT

This action having come on for consideration before the Court, Honorable Tom Stagg, District Judge, presiding, and the issues having been considered and a decision having been rendered, and there being no just reason for delay,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That there be judgment in favor of defendants, Federal Energy Administration and John F. O'Leary, and against plaintiff, Jack W. Grigsby, dismissing Grigsby's claim on the merits, at his cost; and

2. That on the counterclaim by the defendants, United States and Federal Energy Administration, there be partial summary judgment in favor of defendants and against plaintiff, Jack W. Grigsby, ordering Grigsby to comply with the

Federal Energy Administration Remedial Order dated November 29, 1976, as modified by appeal decision and order of March 8, 1977; and

3. That there be summary judgment in favor of the United States and the Federal Energy Administration on the counter-claim by the defendants, ordering the plaintiff, Jack W. Grigsby, to comply with Federal Energy Administration Revised Remedial Order of April 22, 1977.

DATED at Shreveport, Louisiana, this 24 day of January, 1978.

s/ Tom Stagg
TOM STAGG
UNITED STATES DISTRICT JUDGE
(Entered 1 - 26 - 78)

APPENDIX F

MINUTE ENTRY OF NOVEMBER 16, 1977

MINUTE ENTRY

STAGG, J.

November 16, 1977 Filed: November 16, 1977

JACK W. GRIGSBY

versus CIVIL ACTION NO. 77-0258

FEDERAL ENERGY ADMINISTRATION, et al. SHREVEPORT DIVISION

* * *

On August 3, 1977, the Court issued a memorandum ruling ordering partial summary judgment in favor of the government on the government's counter-claim, with respect to the Remedial Order of November 29, 1976. At that time, the Court was unable to grant summary judgment as to the Revised Remedial Order of April 22, 1977, because it did not appear in the record. The Federal Energy Administration now has filed in the record the Revised Remedial Order, and it has renewed its motion for summary judgment based on the now-complete record.

The Court finds that the facts and circumstances regarding the original decision to grant partial summary judgment have not changed substantially. Thus, as was the case in

August, the Federal Energy Administration is entitled to partial summary judgment to enforce the Revised Remedial Order of April 22, 1977. It shall be so ordered.

TS

APPENDIX G

PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Filed: November 16, 1977

JACK W. GRIGSBY

versus CIVIL ACTION NO. 77-0258

FEDERAL ENERGY
ADMINISTRATION, et al.

PARTIAL SUMMARY JUDGMENT

The case having come on for consideration before the Court, Honorable Tom Stagg, District Judge, presiding, and the issues having duly been considered, and a decision having duly been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that there be summary judgment in favor of the United States and the Federal Energy Administration on the counter-claim by the defendant, ordering the plaintiff, Jack W. Grigsby, to comply with the Federal Energy Administration Revised Remedial Order of April 22, 1977.

DATED at Shreveport, Louisiana, this 16th day of November, 1977.

s/ Tom Stagg
TOM STAGG
UNITED STATES DISTRICT JUDGE
Entered 11 - 16 - 77

APPENDIX H

PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Filed: July 28, 1977

JACK W. GRIGSBY

versus CIVIL ACTION NO. 77-0258

FEDERAL ENERGY
ADMINISTRATION, et al.

PARTIAL SUMMARY JUDGMENT

This case having come on for hearing before the Court, Honorable Tom Stagg, District Judge, presiding, and the issues duly having been tried and a decision duly having been rendered.

IT IS ORDERED, ADJUDGED AND DECREED:

(1) that there be judgment in favor of defendant Federal Energy Administration, and against Jack W. Grigsby, dismissing Grigsby's claim on the merits at his cost; and

(2) that on the counterclaim by the defendants, United States and Federal Energy Administration, there be partial summary judgment in favor of defendants and against plaintiff, Jack W. Grigsby, ordering Grigsby to comply with

Federal Energy Administration Remedial Order dated November 29, 1976, as modified by Appeal Decision and Order of March 8, 1977.

DATED at Shreveport, Louisiana, this 28th day of July, 1977.

s/ Tom Stagg
THOM STAGG
UNITED STATES DISTRICT
JUDGE

APPENDIX I

MEMORANDUM RULING

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Filed: July 28, 1977

JACK W. GRIGSBY

versus CIVIL ACTION NO. 77-0258

FEDERAL ENERGY
ADMINISTRATION, et al.

MEMORANDUM RULING

As a result of an audit of the operations of Jack W. Grigsby, d/b/a Grigsby Oil Company (Grigsby), between September 1, 1973, and July 31, 1975, the Federal Energy Administration (FEA) notified Grigsby of probable violations of its price regulations for oil. Grigsby is the operator of a number of oil and gas producing properties in Louisiana. He operates the Heywood RA SUB Unit and the Upper Heywood A RA SUB Unit in the North Jennings Field in Acadia Parish, Louisiana, and the WLPE 41 7600' SU Unit in the West Lake Ponchartrain East Block 41 Field in St. Charles Parish, Louisiana.

The FEA alleged that Grigsby had treated oil produced from the Upper Heywood Unit as "new" oil when he should

have treated it as "old" oil, subject to ceiling prices promulgated by the FEA. It also charged that Grigsby had miscalculated the ceiling price on the "old" oil he produced from the West Lake Ponchartrain Unit. After holding an informal hearing, by Remedial Order of November 29, 1976, the FEA ordered Grigsby to reduce the prices in the Heywood and West Lake Ponchartrain Units and to make restitution with interest to purchasers of oil from those properties for the overcharges.

Grigsby timely perfected an appeal to another level of the FEA, and on March 8, 1977, the FEA affirmed the determination of the Remedial Order as to the Heywood property. It also affirmed the determination as to the West Lake Ponchartrain property, but it increased the price calculation for that property. Grigsby then filed the instant action in this Court, seeking review of the FEA's action and seeking a preliminary injunction to prevent the FEA from causing funds to be released from a special escrow account in which Grigsby had placed the amount of the alleged overcharges.

The Court heard the motion for a preliminary injunction and took the decision under advisement. Since that time, the FEA has filed a counterclaim, seeking injunctive relief and civil penalties against Grigsby for failure to comply with FEA regulations, and the FEA has moved for summary judgment on the main demand and the counterclaim. All of these motions currently are before the Court.

I. Standard of Review

The claim by Grigsby and the counterclaim by FEA are significantly different in nature. The counterclaim is an

original lawsuit seeking traditional judicial relief. The claim by Grigsby is an appeal of an administrative decision, subject only to limited judicial review.

Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §754(a) (1), incorporates the limited standards for judicial review provided in Section 211(d)(1) of the Economic Stabilization Act of 1970. Section 211(d) (1) of the Stabilization Act provides, in pertinent part:

> "[N]o order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that said order is in excess of agency's authority, or is based upon findings which are not supported by substantial evidence."

Congress, in creating the FEA, gave it broad discretionary powers to regulate the price of oil, natural gas, and other energy resources within a defined set of policy goals. Among them was the maintenance of fair and reasonable consumer prices for energy resources and the promotion of expansion of readily usable energy sources. 15 U.S.C. §761(a). Specifically, Congress directed the Federal Energy Administrator to:

> "Promote stability in energy prices to the consumer, promote free and open competition in all aspects of the energy field, prevent unreasonable profits within the various segments of the energy industry, and promote free enterprise . . . ."
> 15 U.S.C. § 764(b)(5).

Congress then delegated to the Administrator the responsibility and the authority to promulgate rules and regulations

as he considered them necessary to carry out the functions vested in him. 15 U.S.C. §766(c).

Congress vested wide discretion in the FEA to regulate the prices and supply of oil and other energy resources. In responding to Congress' broad mandate for the equitable allocation of crude oil at equitable prices, the FEA must balance all of the objectives of the Emergency Petroleum Allocation Act. As a result of the broad mandate and its accompanying responsibility, the Temporary Emergency Court of Appeals has stated the standard for judicial review of FEA action:

> "To be upheld, the action taken by the FEA need not be the same as the court or the appellee might have taken in correcting the problems occurring as a result of the energy crisis and the impact of earlier regulations, so long as the action taken is reasonable." *Pasco, Inc. v. FEA*, 525 F.2d 1391, 1400 (T.E.C.A. 1975)

A Court may not overturn agency action so long as there is a rational basis for that action within the delegation of authority to the agency by Congress. *Pasco, Inc. v. FEA, supra; Pacific Coast Meat Jobbers Association, Inc. v. Cost of Living Counsel*, 481 F.2d 1388 (T.E.C.A. 1973). A strong presumption exists in favor of administrative decisions by agencies charged with the administration of federal statutes, so that the interpretations of the agencies are entitled to "great deference" with respect to decisions concerning the regulations the agency is charged to administer. *Pasco, Inc. v. FEA, supra; Reeves v. Simon*, 507 F.2d 455 (T.E.C.A. 1974), *cert. denied*, 420 U.S. 991, 95 S.Ct. 1426 (1975).

The only other basis for overturning an agency decision is that the findings by the agency are not supported by "substantial evidence." The United States Supreme Court has defined "substantial evidence" as evidence that would justify a Court in denying a motion for a directed verdict in a jury trial. *N.L.R.B. v. Columbian Enameling and Stamping Company*, 306 U.S. 292, 300, 59 S.Ct. 501, 505 (1939). Stated another way, substantial evidence is evidence that a reasonable man would accept as adequate to support a conclusion. *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938).

II. The Heywood Property

A. Findings of Fact

1. The FEA made a determination of fact with respect to the Heywood property based on an informal hearing and the administrative record on appeal.

2. On January 22, 196[illegible], at the instance of Grigsby, the Louisiana Commissioner of Conservation created the Heywood RA SUB Unit, which included several separate mineral leases. Grigsby drilled the "Lucky Strike Well No. 1" on one of the leased premises and began to produce crude oil. In accordance with state law, the unit order provided that operation on and production from the unit would be considered to be operation on and production from each tract within the unit under the terms of each lease included within the unit.

3. After a period of substantial production, the Lucky Strike Well began to produce excessive salt water, so Grigsby

applied to the louisiana Department of Conservation for permission to drill a substitute well for the same unit. The Commissioner granted permission, and Grigsby drilled and completed the "Robert Leger Well No. 1" on another of the leased tracts, beginning production on October 14, 1974.

4. Grigsby considered all production from the Robert Leger Well to be "new" oil under applicable FEA regulations, and he charged upper tier prices for the oil produced from the well. In addition, the purchasers of the oil remitted severance tax payments to the State of Louisiana on behalf of Grigsby.

5. Prior to January 1, 1974, the Louisiana Severance Tax was a fixed amount per barrel of oil. After January 1, 1974, the severance tax was fixed at 12-1/2 per cent of the value of the oil; thus, to the extent Grigsby may have overcharged for oil at the upper tier prices after January 1, 1974, the purchasers may have overpaid Grigsby's severence tax to the state, because that tax was based upon the price they paid Grigsby for the oil.

6. On June 24, 1976, the Louisiana Commissioner of Conservation determined that the Robert Leger Well was completed in a separate reservoir, not in communication with the reservoir from which the Lucky Strike Well produced oil. Thus, he created a second unit, the Upper Heywood A RA SUB Unit, which encompassed the same surface leases as the original Heywood Unit.

7. The FEA concluded that all oil produced from the Robert Leger Well was subject to the calculation of the base production control level to determine "old" crude oil and

"new" crude oil. It determined that Grigsby had overcharged his customers, between October 14, 1974, and July 31, 1975, a total of $368,742.43. The amount of state severence tax included in that figure was $46,092.81.

8. After his appeal to the FEA, the agency ordered Grigsby to reimburse the entire amount of the overcharge, with applicable interest, to his customers. The FEA did not require him to reduce his current prices, because on September 1, 1976, the FEA amended its definition of property so that all oil now produced from the Upper Heywood Unit is treated as oil from a separate "property", thus being all "new crude oil".

B. Conclusions of Law

Substantial Evidence

1. After examining the administrative record, the Court concludes that the findings of fact by the FEA were based on substantial evidence.

Rational Regulation

2. During the period of the audit, the FEA maintained a two-tier system of pricing oil in its first sale. It maintained a ceiling for "old crude oil" that was considerably lower than the allowable price for "new crude oil". Whether oil was considered "old crude oil" or "new crude oil" depended upon whether it came from a "property" that had produced crude oil in 1972. If the "property" from which the oil was produced had produced oil in 1972, "new crude oil" meant:

> "[T]he total number of barrels of domestic crude oil produced and sold in a specific month, less (1) the base production control level for that month, and less (2) the current cumulative deficiency in base production control level crude oil." 10 F.R.C. § 212.72.

If the oil was produced from a "property" that did not produce in 1972, all the oil from that property would be "new crude oil".

3. Crucial to this case is the determination whether Robert Leger Well No. 1 was from the same "property", because the Lucky Strike Well did produce crude oil in 1972. Thus, if the production from the Robert Leger Well was considered production from the same property as the production from the Lucky Strike Well, then Grigsby could charge "new crude oil" prices only for the amount of oil that exceeded the applicable base production control level.

4. The definition of property in the regulations applicable during the period of the audit was:

> "Property is the right which arises from a lease or from a fee interest to produce domestic crude oil." 10 C.F.R. § 212.72.

The FEA interpreted the definition of property in FEA Ruling 1975-15.[1] Especially important is FEA's view, in that ruling, of the treatment of separate reservoirs:

---

1. 40 Fed. Reg. 20831 (Sept. 4, 1975).

"Because the property concept is based upon the right to produce crude oil, whether arising from a lease or from a fee interest, the existence of two or more separate and distinct reservoirs will not in itself create two or more separate 'properties'. Therefore, for purposes of determining BPCL, where a producer holds a single right to produce crude oil from two or more reservoirs, together the two or more reservoirs constitute a single property; where there are separate and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property."

5. The FEA's interpretation of the property concept constitutes a rational approach to balancing the objectives of preserving reasonable and fair prices for consumers for petroleum products and of encouraging new production of petroleum products. Therefore, its promulgation of the regulations and the interpretation of those regulations in this instance was within the authority granted to it by Congress.

6. Under Louisiana law, as determined by the Commissioner of Conservation, production from the Lucky Strike Well No. 1 was considered production from all mineral leases included in the unit defined by the Commissioner. Grigsby does not contend that the lease on which he drilled the Robert Leger Well was not covered by the original unit order. Therefore, production from the Lucky Strike lease was considered production from the Robert Leger lease from the inception of the January 22, 1969, unit order.

7. The drilling of the Robert Leger well involved no new

mineral leases. Therefore, all production from the Robert Leger Well was pursuant to the same lease interest as the production from the Lucky Strike Well. The production from the Robert Leger Well was in accordance with the same right to produce as the production from the Lucky Strike Well. Pursuant to 10 C.F.R. § 212.72, the crude oil produced from the Robert Leger Well and from the Lucky Strike Well was produced from the same property.

8. Because he treated all oil from the Robert Leger Well as "new crude oil", Grigsby overcharged his purchasers $342,742.43. Of that amount, $46,092.81 was paid to the state by the purchasers as severance taxes. Grigsby contends he should not have to refund the amount of the severance taxes.

9. The person who is ultimately liable to the state for the severance taxes should be the person to seek refund from the state. If the liability for the severance taxes falls on the purchasers, they have overpaid the state and they should seek the refund without reimbursement by Grigsby. If the liability falls on Grigsby, he should reimburse the purchasers and seek his refund from the state.

10. The Louisiana Severence Tax is a tax on natural resources severed from the soil or the water. La. R.S. 47:631. The tax is payable by the owner of the natural resources. La.R.S. 47:632. The responsibility for reporting the severence and paying the tax falls on the severer. La.R.S. 47:635. He must withhold the tax from the royalty or other payments to the owners, or cause the purchaser of the natural resources to withhold the tax from the price paid to him and remit the tax to the state. La. R.S. 47:636, 637. The law is

clear that by causing the purchaser to withhold and remit the tax, the severer does not shift the liability for the tax to the purchaser:

> "[N]othing herein shall be construed as releasing the person severing the products from liability for the payment of the taxes." La. R.S. 47:637.

Clearly, the liability falls on the severer. Any payment by the purchaser is made on behalf of the severer.

11. Without question, Grigsby was the severer of the natural resources in this case. The liability for the severence tax, therefore, falls on him. If he overpaid the state, through his purchasers, then he should reimburse the purchasers and seek his refund from the State of Louisiana. The FEA correctly included the severence tax in its refund calculation.

12. In determining Grigsby's position with respect to the Heywood property, the FEA acted within its authority on the basis of substantial evidence. The FEA's appeal determination of March 8, 1977, as it relates to the Heywood property, must be AFFIRMED.

III. West Lake Ponchartrain Property

A. Findings of Fact

1. The basic facts, as they relate to the West Lake Ponchartrain property, are undisputed. The major dispute lies in the interpretation and application of regulations to those facts. Specifically, the parties dispute what was the "posted price" for oil produced from the West Lake Ponchartrain

property on May 15, 1973, and, if there was no "posted price", what was the nearest comparable posted price.

2. The West Lake Ponchartrain Unit produced crude oil during 1972, therefore being subject to the two-tier price system of the FEA. All oil produced from the property during the time in question was "old crude oil". The East Block 41 Field was not named in any price bulletin of general applicability on May 15, 1973.

3. At 6:00 A.M., local time, May 15, 1973, Grigsby sold crude oil to Shell Oil Company from the WLPE unit pursuant to a contract with Shell. In the contract, a price was stated:

> "Shell will pay a flat $3.75 per barrel, to fluctuate with any changes in the arithmetic average of the prices posted for 40° gravity crude oil by Shell for Good Hope field, Texaco for Caillou Island field, Exxon for Avery Island field and Gulf for Delta (Ostrica) in effect each day during the calendar month of delivery hereunder after allocating such deliveries to equal daily quantities."

The contract was individually negotiated between Grigsby and Shell.

4. During the period covered by the audit, Grigsby charged Shell in accordance with that contract's price. The oil produced from the unit was between 37° and 37.9° of gravity.

5. At 6:00 A.M., May 15, 1973, a Shell price bulletin provided posted prices for the Shell Good Hope Field. The bulletin provided a price of $4.00 per barrel for crude oil with a

gravity of 40 ¢ or more and subtracted 2 ¢ per barrel from the price for each full degree of gravity below 40.9°. Therefore, the price according to the price bulletin for crude oil with a gravity between 37° and 37.9° was $3.94 per barrel.

6. The FEA found that the contract price between Shell and Grigsby was not a "posted price", and therefore it could not be the basis for determining the price of the oil produced from the WLPE Unit. The FEA found the nearest "posted price" to be the Shell Good Hope Field Price Bulletin price. On the basis of that determination, the FEA determined that Grigsby had overcharged his purchasers 6¢ per barrel. The amount of the overcharge included an amount paid as severence taxes to the State of Louisiana.

B. Conclusions of Law

Substantial Evidence

1. After examining the administrative record, the Court concludes that the findings of fact were based on substantial evidence.

Rational Regulation

2. Pursuant to Congress' direction in 15 U.S.C. § 764(b)(5), 766(c), the FEA promulgated regulations establishing a ceiling price on "old crude oil". The Court finds those regulations are a reasonable exercise of administrative authority, within the discretion afforded the agency by Congress.

3. According to the regulations, the maximum charge for crude oil subject to the ceiling price was:

> "[T]he sum of the highest posted price at 6:00 a.m., local time, May 15, 1973, for that grade of crude petroleum at that field, or if there are no posted prices in that field, the related price for that grade of domestic crude petroleum which is most similar in kind and quality at the nearest field for which prices are posted; and (ii) a maximum of $.35 per barrel." 6 C.F.R. § 150.353, incorporated by 10 C.F.R. § 212.73.

Later, the FEA amended the second part of the formula to increase the maximum to $1.35.

4. The FEA adopted the Cost of Living Council (CLC) regulations concerning prices for oil. The CLC had defined "posted price" as:

> "[A] written statement of crude petroleum prices circulated publicly among sellers and buyers of crude petroleum in a particular field in accordance with historic practices generally known by sellers and buyers within the field." 38 Fed. Reg. 3357 at 33578 (December 6, 1973).

The FEA has not altered that definition of posted price. Indeed, 10 C.F.R. § 212.31 now includes a definition of "posted price" identical to the CLC definition.

5. Commenting on the "posted price" regulations, the FEA has interpreted the definition:

> "Other than the published price bulletins of the type traditionally issued by major oil companies,

> FEA will only recognize as a 'posted price' written offers to purchase only so long as they were bona fide written offers of general applicability to crude oil producers in the field. For example, a letter from a purchaser to all crude oil producers in a field or in an area would constitute a posted price if the letter was understood by producer and the purchaser to be a bona fide offer to purchase from all producers in that field or area. A written contract, of course, would not qualify as a posted price because it represents an agreement between a buyer and specific producer, not a bona fide offer to purchase from all producers." FEA Rul. 1977-1.

6. No price offer, or bulletin, of general applicability was in effect for the WLPE Unit on May 15, 1973. The FEA determined that Shell's bulletin applicable to the Good Hope Field was the appropriate posted price to use in determining the ceiling price for the lower tier oil from the unit. The FEA's approach was rational. The Good Hope Field involved the same purchaser as the WLPE Unit, and the parties themselves had used the Good Hope bulletin as a gauge for the price for WLPE Unit oil.

7. Grigsby argues that the bulletin language, stasting that the bulletin is subject to existing contracts between Shell and other purchasers and producers, means that the contract prices apply to the bulletin as "posted prices". His argument would destroy the entire intent behind requiring prices to be set at the generally applicable price level on May 15, 1973, by interpreting all posted prices to be subject to contract prices. The FEA chose not to interpret posted prices

in such a manner and was rational in its choice.

8. On appeal, the FEA allowed 12¢ to be added to the remedial order price for transportation costs that the remedial order had deducted. Grigsby argues that the FEA erred by using part of the individual contract, but not all of it, to determine the price. But the FEA did not reverse the remedial order because of the contract; rather, it reversed the remedial order because the price bulletin for the Good Hope Field provided that Shell would furnish transportation from a "designated facility". The FEA merely found Grigsby's dock to be that "designated facility". The FEA, thus, was consistent in its application of the "posted price".

9. For reasons already explained in Part II, any overcharges to be refunded by Grigsby must include the state severence tax payments.

10. The FEA acted rationally, on the basis of substantial evidence, in its decision on appeal from the remedial order with respect to the WLPE Unit. Therefore, that decision must be AFFIRMED as it applies to the West Lake Ponchartrain property.

IV. Counterclaim by the United States and FEA

In a counterclaim, the FEA, joined by the United States, asks the Court to order Grigsby to comply with the Remedial Order of November 29, 1976, the Appeal Decision and Order of March 8, 1977, and the Revised Remedial Order issued April 22, 1977. The counterclaim also seeks civil penalties and the costs of litigation.

For the reasons stated in Parts II and III, the FEA and the

United States are entitled to summary judgment with respect to the Remedial Order of November 29, 1976, and the Appeal Decision and Order of March 8, 1977. The Court cannot grant summary judgment as to the Revised Remedial Order of April 22, 1977, because it does not appear anywhere in the record. With respect to civil penalties, the Court cannot render summary judgment. The parties have not briefed the issues involved thoroughly. The Court cannot determine the number of violations or any mitigating circumstances that might reduce any penalties to be assessed against Grigsby. Clearly, there remain genuine issues of material fact that must be resolved before judgment can be rendered on the civil penalties.

V. ORDER

For the reasons stated above, IT IS ORDERED:

(1) That the motion by Jack W. Grigsby for a preliminary injunction be DENIED; and

(2) That partial summary judgment be rendered against the plaintiff, Jack W. Grigsby, and in favor of the Federal Energy Administration, dismissing Grigsby's complaint and ordering him to comply with the Remedial Order of November 29, 1976, as amended by the Appeal Decision and Order of March 8, 1977.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana this 28th day of July, 1977.

s/ Tom Stagg
TOM STAGG
UNITED STATES DISTRICT JUDGE

APPENDIX J

DECISION AND ORDER

FEDERAL ENERGY ADMINISTRATION
WASHINGTON, D.C.

March 8, 1977

DECISION AND ORDER
OF THE FEDERAL ENERGY ADMINISTRATION

Appeal

Name of Petitioner: Jack W. Grigsby d/b/a Grigsby Oil and Gas

Date of Filing: December 14, 1976

Case Number: FRA-1082

On December 14, 1976 Jack W. Grigsby doing business as Grigsby Oil and Gas (Grigsby) filed an Appeal from a Remedial Order which the Deputy Regional Administrator of FEA Region VI issued to the firm on November 29, 1976.

I. *Background*

Grigsby is the operator of a crude oil producing property known as the Heywood RA SUB drilling unit (the Heywood unit), which is located in the North Jennings Field, Acadia Parish, Louisiana. The Heywood unit, which encompasses tracts covered by five mineral leases, was created effective

January 22, 1968 by order of the Commissioner of Conservation of the State of Louisiana. The Commissioner's order pooled the separately owned tracts and leases within the area and provided that operations on and production from the Heywood unit would be considered operations on and production from each of the tracts within the unit.

Grigsby is also the operator of a crude oil producing property known as the WLPE 41 SU located in the West Pontchartrain East Block Field, St. Charles Parish, Louisiana (the Pontchartrain property). As a result of its activities, Grigsby is a "producer" as that term is defined in 10 CFR 212.31 and is therefore subject to the provisions of Part 212, Subpart D of the FEA Mandatory Petroleum Price Regulations.

II. *The Remedial Order*

In the Remedial Order which was issued to Grigsby, the Deputy Regional Administrator of FEA Region VI found that during the period October 14, 1974 through July 31, 1975 Grigsby had improperly charged uncontrolled prices for the crude oil which it produced and sold from the Heywood unit. According to the Remedial Order, Grigsby terminated crude oil production from the unit well on the Heywood unit on October 14, 1974 and began crude oil production from a substitute well at that time. Under the provisions of 10 CFR 212.72 and 212.73, crude oil produced and sold from the Heywood unit which did not exceed the property's base production control level (BPCL) for the corresponding month of 1972 was "old oil", and was subject to the applicable ceiling price. However, the Remedial Order found that during the period October 14, 1974 through July 31, 1975 Grigsby sold all of the crude oil which

it produced from the Heywood unit as "new crude oil" without regard to the property's BPCL. The Remedial Order found that as a result, Grigsby received $268,742.43 in overcharges from the Cities Service Oil Co. and the Cities Service Pipeline Co. (Cities Service).

The Remedial Order further found that during the period September 1, 1973 through July 31, 1975 Grigsby improperly computed the ceiling price applicable to the crude oil produced and sold from the Pontchartrain property and as a result charged 18 cents per barrel in excess of the maximum allowable selling price computed pursuant to 6 CFR 150.353 and 10 CFR 212.73. According to the Remedial Order, although Grigsby sold crude oil from the Pontchartrain property on May 15, 1973 there was no posted price for West Lake Pontchartrain crude oil on that day. The Remedial Order therefore found that under the provisions of 10 CFR 212.73 the applicable ceiling price for West Lake Pontchartrain crude oil should have been computed on the basis of the May 15, 1973 price for "that grade on domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted." 10 CFR 212.73 The Remedial Order found that on May 15, 1973 the posted price for crude oil in the field nearest to the West Lake Pontchartrain Field was $ 4.00 per barrel for 40.0 API Crude oil, less 2 cents per degree reduction for each full degree below 40.9° . The posted price in the West Lake Pontchartrain Field was subject to further reduction if transportation was provided by the purchaser. According to the Remedial Order, the crude oil which Grigsby sold from the Pontchartrain property on May 15, 1973 was between 37.0° and 37.9° gravity. The Remedial Order further found that transportation for that crude oil was provided by the purchaser. The Remedial

Order therefore determined that for the purposes of computing the ceiling price applicable to West Lake Pontchartrain Field crude oil, the May 15, 1973 price is $3.82 per barrel. [1] The Remedial Order found that Grigsby has been using a May 15, 1973 price of $4.00 per barrel for the purposes of computing the applicable ceiling price and as a result has been overcharging the purchasers of this crude oil by 18 cents per barrel. According to the Remedial Order, during the period September 1973 through July 1975 Grigsby received a total of $51,546.76 in overcharges from Shell Oil Co. (Shell), Stone Energy Co. (Stone), and Summit Gas Co. (Summit).

On the basis of these determinations, the Remedial Order directed Grigsby to:

(i) refund $368,742.43 plus applicable intered to Cities Service; $25,322.04 plus applicable interest to Shell; $14,070 plus applicable interest to Stone; and $12,154.11 plus applicable interest to Summit;

(ii) reduce the prices charged for the crude oil produced from the Heywood unit and the Pontchartrain property to lawful prices determined pursuant to 10 CFR 212.73 and 212.74;

(iii) recalculate the maximum allowable selling prices for the crude oil produced from the Heywood unit and the Pontchartrain property between August 1, 1975 and the date of the issuance of the Remedial Order, and make refunds for any overcharges which Grigsby received during that period, plus applicable interest.

---

1. The May 15, 1973 posted price in the West Lake Pontchartrain Field for 40° crude oil was $4.00 per barrel. The Remedial Order found that the gravity adjustment was 6 cents per barrel, and the transportation adjustment was 12 cents per barrel. $4.00 - (.06 + .12) = $3.82.

In connection with its present Appeal, Grigsby also requested that the requirements of the Remedial Order be stayed. In a Decision and Order which was issued to the firm on December 23, 1976, the FEA determined that in order to avoid irreparable injury to Grigsby and to maining the *status quo ante* pending a final determination of Grigsby's Appeal of the Remedial Order, it would be appropriate to grant a stay of the requirement that Grigsby make immediate refunds to Shell, Cities Service, Stone, and Summit. However, Grigsby was required to place the disputed funds into an escrow account. *Jack W. Grigsby d/b/a Grigsby Oil and Gas*, 4 FEA Par. _____ (December 23, 1976). Similarly, the FEA determined that the requirement of the Remedial Order that Grigsby immediately reduce the prices charged for the crude oil produced from the Heywood unit and the Pontchartrain property should also be stayed provided that Grigsby:

> deposit into the escrow account on a weekly basis a sum of money which is equal to the number of barrels of crude oil produced from the Heywood unit multiplied by the difference between the actual selling price of the crude oil and the maximum allowable selling price computed pursuant to 10 CFR 212.73 and 212.74; plus the number of barrels of crude oil produced from the Pontchartrain property multiplied by the difference between the actual sales price of the crude oil and the maximum allowable price computed pursuant to 10 CFR 212.73 and 212.74.

III. *Grigsby's Contentions on Appeal*

In its Appeal, Grigsby contends that the findings of the Remedial Order with respect to the Heywood unit are

erroneous in fact and in law. Grigsby states that the reservoir from which the new unit well produces crude oil is separate and distinct from the reservoir from which the old well had produced crude oil. Grigsby therefore contends that all crude oil produced from the property subsequent to October 14, 1974, when the new well began operating and the old well was shut down, should be considered as "new crude oil" for the purposes of the FEA Regulations.

Grigsby also contends that the findings of the Remedial Order with respect to the Pontchartrain property are erroneous in fact and in law. Grigsby states that the May 15, 1973 price for the crude oil produced from the Pontchartrain property was established under the terms of a contractual agreement which was in effect at the time between Grigsby and Shell. Grigsby argues that because Shell was the only purchaser of the crude oil which Grigsby produced from the Pontchartrain property on May 15, 1973, the price established by the contract between Shell and Grigsby should be regarded as the May 15, 1973 posted price. Grisby states that under the terms of the contract, the price for West Lake Pontchartrain crude oil on May 15, 1973 was $4.00 per barrel. Grigsby also argues that even if the contract price is not regarded as the posted price, the "related price" for that crude oil would also be $4.00 per barrel. Grigsby therefore contends that it properly computed the applicable ceiling price levels for the crude oil which the firm produced from the Pontchartrain property.

Grigsby also contends that the Remedial Order is arbitrary and capricious because it requires the firm to refund all of the overcharges in question. Grigsby states that it will in all likelihood be unable to recover the share of the overcharges

which was received by Grigsby's working interest partners and the royalty owners of the Heywood unit and the Pontchartrain property. Grigsby also argues that under applicable state law, it cannot recover the portion of the overcharges which was paid to the State of Louisiana in the form of severance taxes.

IV. *Analysis*

A. *Issues Relating to the Heywood Unit*

The two tier crude oil pricing system originated as part of the Cost of Living Council's Phase IV Petroleum Price Regulations, 6 CFR, Part 150, Subpart L, which were promulgated in final form on August 17, 1973 and subsequently adopted by the FEA. *See* 38 Fed. Reg. 22538 (August 22, 1973). Prior to February 1, 1976, the provisions of 10 CFR, Part 212, Subpart D generally required crude oil producers to determine the first sale price of domestic crude oil from a particular property in a particular month in accordance with the BPCL for that property, *i.e.*, the total number of barrels of crude oil produced and sold from the property in the same month of 1972. Crude oil production and sale from a property which did not exceed the BPCL was generally subject to the lower tier ceiling price rule set forth in 10 CFR 212.73; crude oil production which exceeded the sum of the BPCL and any deficiency which had accumulated could be sold without regard to the ceiling price rule. For a full discussion of the provisions of Subpart D as they existed prior to February 1, 1976 *see Fred J. Russel*, 2 FEA Par. 83,082 (March 26, 1975).

The FEA recently amended Part 212, Subpart D in order to

implement the crude oil pricing policies which Congress set forth in Section 401 of the Energy Policy and Conservation Act (EPCA, P.L. 94-163, December 22, 1975) and in Section 121 of the Energy Conservation and Production Act (EPCA, P.L. 94-385; August 14, 1976). In doing so, the FEA promulgated a two-tier pricing mechanism under which crude oil production from a property which does not exceed the property's BPCL must be sold pursuant to the lower-tier ceiling price rule set forth in 10 CFR 212.73. Crude oil production from a property which exceeds the sum of that property's BPCL and cumulative deficiency may be sold pursuant to the upper tier ceiling price rule set forth in 10 CFR 212.74.[2]

In the Remedial Order which was issued to Grigsby, FEA Region VI found that subsequent to October 14, 1974, Grigsby sold the crude oil which it produced from the Heywood unit as new crude oil without regard to the property's BPCL, and therefore violated applicable FEA crude oil pricing regulations. Grigsby on the other hand contends that subsequent to October 14, 1974 the Heywood unit has been a "new" property and that all of the crude oil produced and sold from the unit since October 14 is therefore "new" crude oil. In support of this contention, Grigsby has presented an Order of the Commissioner of Conservation for the State of Louisiana dated June 24, 1976 which states that the reservoir from which the new unit well on the Heywood unit produces crude oil is separate and distinct from the reservoir from which the old unit well produced crude oil. Furthermore, the Commissioner's Order recognizes the Heywood unit as a

2. For a full discussion of the provisions of Part 212, Subpart D and the amendments which were adopted on February 1, 1976, in order to implement the policies set forth in EPCA, *see Pruet and Hughes Co.*, 3 FEA Par. 83, 116 (February 27, 1976); and *Great Southern Oil and Gas Co., Inc.*, 3 FEA Par. 83,111 (February 27, 1976).

new crude oil producing property subsequent to the date that production began from the new unit well.

In *Ruling 1977-1* which was published on January 19, 1977, 42 Fed. Reg. 3628 (January 19, 1977), Fed. Energy Guidelines Par. 16,065, the FEA discussed the manner in which the "property" concept should be applied in particular factual circumstances. In that Ruling, the FEA specifically addressed the issue of past applications of the "property" concept in situations involving crude oil produced from separate "reservoirs":

> The most complex and apparently controversial issue with respect to segregation of a premises subject to a single right to produce has to do with production from separate "reservoirs." FEA has studied this issue at considerable length but has been unable to find a solution which is likely to be satisfactory to all parties concerned. FEA has concluded on the basis of the review of the legislative and regulatory history and the general considerations outlined above that a premises which contains multiple reservoirs but which is subject to a single right to produce may not, simply by virtue of the existence of separate reservoirs, be treated as comprising multiple "properties."
>
> FEA does not believe that the language of the definition of the existing term "property" can be construed to mean that production from separate reservoirs subject to the same working interest would, simply by virtue of the fact that the several reservoirs have been developed and produced separately, be regarded as production from separate properties. (Producers have been on express notice of this at least since the issuance of *FEA Ruling 1975-15* on

August 29, 1975). Moreover, any producers which adopted a reservoir-by-reservoir approach to the definition of property (and, hence, to the computation of amounts of "new" and "released" crude oil) would typically have been in a position to achieve greater benefits under the price regulations over the past three years than those producers who took the approach of aggregating production from all reservoirs subject to the same right to produce, as required under the regulations. At least until February 1, 1976, any producer that treated each reservoir as a separate property automatically would have obtained "new" crude oil whenever production was obtained from a new reservoir. Producers using the lease approach, on the other hand, were required first to exceed 1972 levels of production from the lease concerned before any production from a new reservoir would be regarded as "new" crude oil. FEA has unfortunately not been able to obtain any approximation of the extent to which producers have actually adopted a reservoir-by-reservoir definition of property.

Under these circumstances, FEA has concluded that it would be inequitable to permit producers who took an expansive and, in FEA's view, unwarranted view of the term property to obtain benefits that were not afforded to producers who adhered closely to the regulations. Thus, FEA has concluded that separate reservoirs which are subject to the same right to produce will generally not be treated as separate properties prior to September 1, 1976.

According to the portion of Ruling 1977-1 regarding past applications of the property concept, crude oil production from more than one reservoir subject to the same "right to

produce"will be considered to be crude oil production from one "property" for the purposes of the FEA Mandatory Petroleum Price Regulations. Therefore, the ceiling price rule set forth in 10 CFR 212.73 is applicable to all crude oil production from the Heywood unit during the period October 14, 1974 through September 1, 1976 which did not exceed the BPCL for this property. The Remedial Order is therefore correct in its finding that Grigsby was in violation of 10 CFR, Part 212, Subpart D with respect to its production and sale of crude oil from the Heywood unit during that period.

However, on September 1, 1976 the FEA amended the provisions of 10 CFR 212.72 with respect to the definition of the term "property". Subsequent to September 1, 1976 "property" is defined as:

> the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such a reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation. 10 CFR 212.72; 41 Fed. Reg. 36171 (August 26, 1976)

In Ruling 1977-2 which was published on January 25, 1977, 42 Fed. Reg. 4409 (January 25, 1977), Fed. Energy Guidelines Par. 16,066, the FEA further addressed the nature of the "recognition" by the appropriate governmental regulatory authority of a separate reservoir. In that Ruling, the FEA stated that:

What constitutes "recognition" by the appropriate governmental authority will be a matter for resolution on a case-by-case basis by FEA regional officials who are in a position to be more familiar with state practices in this region. Generally, however, the following guidelines shall be used in making such determinations. The mere requirement that a producer must report to the regulatory body on the basis of separate reservoirs does not constitute government recognition. Rather, before a producer may treat a producing reservoir as an FEA property, there must have been some review by the appropriate regulatory body of factual considerations leading to a determination by the regulatory body that the reservoir is separate and distinct from, and not in communication with, any other reservoir subject to the same right to produce. Such determination by the regulatory body must be signified by an affirmative action: the mere receipt by the regulatory body of production or other types of reports, for example, does not constitute the requisite affirmative action.

In some states, the state regulatory body may conduct a formal proceeding to establish the limits of producing reservoirs. At such proceedings, evidence is taken from interested parties, a hearing is held, and after thorough consideration of the record, the state issues an order setting forth its determination as to the physical limits of the reservoir. The state's determination contained in such an order would constitute the requisite affirmative action.

The material which Grigsby submitted in this proceeding convincingly demonstrates that the Department of Conservation of the State of Louisiana has affirmatively recognized the reservoir from which Grigsby is currently producing

crude oil at the Heywood Unit to be separate and distinct from the reservoir from which the firm was producing crude oil prior to October 14, 1974. This material shows that the Louisiana Department of Conservation conducted a public hearing on this matter on June 15, 1976, and issued an Order on June 24, 1976. *State of Louisiana Department of Conservation Order No. 464-K* (June 24, 1976). Finding No. 7 of the June 24 Order states that "the Upper Heywood 'A' Sand, Reservoir A, is a reservoir separate and distinct from the Heywood Sand, Reservoir A." Heywood, Sand Reservoir A is the reservoir from which Grigsby was producing crude oil prior to October 14, 1974. Therefore, pursuant to the provisions of 10 CFR 212.72, Grigsby may elect to treat subsequent to September 1, 1976, the two Heywood unit reservoirs as separate properties. Since the reservoir from which Grigsby is currently producing crude oil at the Heywood unit did not produce any crude oil during calendar year 1972, all of the crude oil produced and sold from the Heywood unit subsequent to Grigsby's election to treat the reservoir as a separate property may qualify as "new" crude oil. Consequently, the findings of the Remedial Order as they relate to Grigsby's sales of crude oil from the Heywood Unit since September 1, 1976 are erroneous to the extent that a continuous violation is alleged to have occurred subsequent to such an election by Grigsby.

B. Proper Calculation of the Ceiling Price for Pontchartrain Property Crude Oil

FEA price regulatioins employ historical crude oil posted prices as reference points for determining lower and upper tier ceiling prices. Lower tier ceiling price are determined by reference to the highest posted prices for the same grade

of crude oil in the same or nearest field on May 15, 1973, plus a per barrel increment. Under the provisions of 10 CFR 212.31, "posted price" is defined as:

> a written statement of crude oil prices circulated publicly among sellers and buyers of crude oil in a particular field in accordance with historic practices, and generally known by sellers and buyers within the field.

The FEA elaborated upon the definition of "posted price" in Ruling 1977-1, *supra*. In that Ruling, the FEA stated that:

> Other than the published price bulletins of the type traditionally issued by major oil companies, FEA will only recognize as a "posted price" written offers to purchase only so long as they were bona fide public written offers of general applicability to crude oil producers in the field. For example, a letter from a purchaser to all crude oil producers in a field or in an area would constitute a posted price if the letter was understood by producer and the purchaser to be a bona fide offer to purchase from all producers in that field or area. A written contract of course, would not qualify as a posted price because it represents an agreement between a buyer and specific producer, not a bona fide offer to purchase from all producers.

The record in this matter indicates that the West Lake Pontchartrain Field was not mentioned in any of the price bulletins which were in effect on May 15, 1973. Consequently, under the provisions of 10 CFR 212.73 the applicable May 15, 1973 posted price for West Lake Pontchartrain Field

crude oil is "the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted." In this case, the nearest field for which prices were posted is the Good Hope Field. The price bulletin which was in effect for the Good Hope Field on May 15, 1973 was the *Shell Oil Company Price Bulletin No. 53*, April 23, 1973. This price bulletin established the prices which the Shell Oil Company would pay for various grades of crude oil. According to this price bulletin, Shell would pay $4.00 per barrel for 40° gravity crude oil, and $3.94 per barrel for crude oil which was between 37° and 37.9° gravity.

In the Remedial Order which was issued to Grigsby, FEA Region VI found that the gravity of the crude oil which Grigsby produced from the Pontchartrain property on May 15, 1973 was between 37° and 37.9°. FEA Region VI further found that 12 cents per barrel should be deducted from the applicable May 15, 1973 posted price to reflect transportation expenses paid by the purchaser. The Remedial Order therefore found that the applicable May 15, 1973 posted price of Pontchartrain property crude oil is $3.82 per barrel. In its Appeal, Grigsby contends that this finding was erroneous in fact and in law, and that the applicable May 15, 1973 price is $4.00 per barrel. Grigsby states that the applicable May 15, 1973 price was established under the terms of a contractual agreement which was in effect between Grigsby and Shell.

Grigsby's contention that the price set by the contract in effect between Shell and Grigsby on May 15, 1973 constitutes the posted price is without merit. The generally applicable FEA regulations clearly specify that in situations where

no posted prices existed for a particular field on May 15, 1973, the applicable May 15, 1973 price is the posted price for that grade of crude oil which is most similar in kind and quality in the nearest field in which prices were posted. These Regulations further specify that a written contract between a crude oil producer and a purchaser does not qualify as a posted price. The finding of the Remedial Order that on May 15, 1973, Grigsby produced crude oil from the Pontchartrain property of a gravity between 37° and 37.9° is uncontested. Similarly there appears to be no dispute as to the fact that the Good Hope Field is the nearest field to the Pontchartrain field for which prices were posted. Consequently, the applicable reference price for the crude oil which Grigsby sold from the Ponchartrain field is the May 15, 1973 posted price in the Good Hope Field for crude oil between 37° and 37.9° or $3.94 per barrel.

However, we find no basis in fact for the 12 cent per barrel transportation adjustment which the Remedial Order applied to the $3.94 per barrel posted price. The Shell price bulletin provided that Shell would pay the specified price for crude oil "delivered into the facilities designated by Shell Oil Company; provided that any transportation from the lease tanks into the facilities designated shall be born by the seller." The "designated facilities" in this case were specified under the terms of the contract then in effect between Grigsby and Shell. Under the terms of that contract, Grigsby bore all of the costs associated with the delivery of the crude oil from its storage facility to the point where Shell took title to the crude oil. The record in this matter contains no basis for the conclusion that transportation was being provided by Shell on May 15, 1973. There is no mention of a 12 cent per barrel transportation charge except in a contract

between Grigsby and Shell dated June 11, 1971 which was superceded by a contract entered into on June 11, 1972. We therefore have concluded that the applicable May 15, 1973 posted price for crude oil produced from the Pontchartrain property is $3.94 per barrel. Accordingly, the Remedial Order should be remanded to the Regional Administrator of FEA Region VI for a recomputation of the overcharges associated with Grigsby's sales of crude oil from the Pontchartrain property, based upon a May 15, 1973 posted price of $3.94.

C. *Repayment of Overcharges*

In its Appeal, Grigsby contends that the Remedial Order is arbitrary and capricious with respect to the remedial action which the firm is required to undertake. Grigsby states that a portion of the overcharges in question have been disbursed to the royalty interest owners, and that the firm will in all likelihood be unable to recover these funds. Grigsby further states that because the laws of the State of Louisiana do not permit a firm to recover severance taxes which have already been paid, Grigsby will be unable to recover that portion of the overcharges which were paid to the State of Louisiana in the form of severance taxes. On the basis of these congentions, Grigsby requests that the refunds which it is required to remit be reduced.

We have considered Grigsby's contentions and we do not find them persuasive. The record in this matter shows that Grigsby has acted, and continues to act, as the agent for the royalty interest owners of the Heywood unit. In this capacity, Grigsby can certainly seek restitution for that portion of the overcharges which were disbursed to the royalty interest

owners. Grigsby has not presented any material in its present submission which shows that the recovery of overcharges from the royalty interest owners would be unduly burdensome. In addition, Grigsby has not convincingly demonstrated that the firm would be unable to recover that portion of the overcharges which were paid to the State of Louisiana in the form of severance taxes. Furthermore, even if Grigsby were to make such a showing, we find no reason to relieve Grigsby of the obligation to make restitution to those purchasers of crude oil which it unlawfully overcharged in the past.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Jack W. Grigsby d/b/a Grigsby Oil and Gas from the Remedial Order issued to it on November 29, 1976 by the Deputy Regional Administrator of FEA Region VI be and hereby is granted as set forth in Paragraphs (2) and (3) below.

(2) Insofar as the November 29, 1976 Remedial Order pertains to crude oil production and sales from the Heywood RA SUB Drilling Unit subsequent to Grigsby's election to treat the reservoir from which it is currently producing crude oil at the Heywood Unit as a separate property, the Remedial Order be and hereby is rescinded.

(3) Insofar as the November 29, 1976 Remedial Order pertains to the WLPE 41 SU Property in the West Lake Pontchartrain East Block Field, the Remedial Order be and hereby is remanded to the Regional Administrator for recalculation of the overcharges which Grigsby

must refund. Within 45 days of the date of the issuance of this Order, the Regional Administrator shall issued a revised Remedial Order. In assessing refunds in the revised Remedial Order, the Regional Administrator shall calculate the applicable ceiling prices for Pontchartrain Property crude oil based upon a May 15, 1973 posted price of $3.94 per barrel.

(4) Except as specified above, the Appeal which Grigsby filed on December 14, 1976 be and hereby is denied.

(5) The Deputy Assistant Administrator for Compliance of the FEA shall take all steps necessary to ensue that the following disbursement is made of the funds which Grigsby deposited in the escrow account that was established pursuant to the provisions of the December 23, 1976 Decision and Order:

(a) Cities Service Oil Company and Cities Service Pipeline Company shall be permitted to recover all funds deposited by Grigsby which represent the overcharges and interest which Grigsby was required to refund as a result of its production and sales activities at the Heywood unit between October 14, 1974 and the date of Grigsby's election to treat the reservoirs at the Heywood Unit as separate properties.

(b) Grigsby shall be permitted to recover from the escrow account all funds which it deposited which represent the alleged overcharges and interest which Grigsby was required to refund as a result of its production and sales activities at the Heywood

Unit subsequent to Grigsby's election to treat the reservoir from which it is currently producing crude oil at the Heywood Unit as a separate property.

(6) All other sums of money deposited by Grigsby in the escrow account shall remain in the account pending further order by the FEA.

(7) Paragraph 4(d) of the Order issued to Grigsby on December 23, 1976 be and hereby is vacated.

(8) Except as provided in Paragraphs (5) and (7) of this Order, the Stay granted to Grigsby shall remain in effect until the issuance of the revised Remedial Order referred to in Paragraph (3) of this Order. At that time, the Deputy Assistant Administrator for Compliance of the FEA or his designee shall take all steps necessary to:

(a) permit Shell Oil Company, Stone Energy Co., and Summit Gas Co., to recover from the escrow account established by Grigsby the overcharges and associated interest which Grigsby will be required to remit to these firms under the terms of the revised Remedial Order referred to in Paragraph (3) of this Order;

(b) permit Grigsby to recover from the escrow account any funds remaining in that account after the overcharges and interest referred to in (a) above are remitted to these firms.

(9) This is a final order of the Federal Energy Administration of which an aggrieved party may seek judicial review.

s/ Melvin Goldstein
Melvin Goldstein
Director
Office of Exceptions and Appeals

Date: Mar 8 1977

APPENDIX K

REMEDIAL ORDER

FEDERAL ENERGY ADMINISTRATION
REGION VI
DALLAS, TEXAS

Telephone:
749-7701

P.O. Box 35228
2626 W. Mockingbird Lane
Dallas, Texas 75235

Received Dec. 1, 1976

REMEDIAL ORDER

TO

November 29, 1976 JACK W. GRIGSBY 6CN/691

D/B/A
GRIGSBY OIL AND GAS

Mr. Jack W. Grigsby
D/B/A Grigsby Oil and Gas
1108 Commercial National Bank Bldg.
Shreveport, Louisiana 71101

Case No. 641C00011

Dear Mr. Grigsby:

On February 17, 1976, the Federal Energy Administration ("FEA") issued a Notice of Probable Violation ("Notice") to Jack W. Grigsby d/b/a Grigsby Oil Company ("Grigsby") pursuant to 10 CFR Section 205.191. In that Notice, FEA alleged Grigsby's sale of certain crude oil at prices in excess of the prices permitted by CLC and FEA regulations. By

letter dated March 5, 1976, Grigsby filed a written reply to the Notice. A conference was held on March 18, 1976 between Grigsby, his attorney, representatives of Clovelly Oil Company, Inc., representatives of Lake Pontchartrain Gas Production Company and FEA personnel to discuss the contents of the Notice.

Based upon the information available to FEA and after consideration of Grigsby's written and oral responses to the Notice, the FEA finds that violations of 6 CFR Section 150.354 and 10 CFR Section 212.73 have occurred, and are continuing to occur as further described herein.

NOW, THEREFORE, pursuant to 10 CFR Section 205.192 (a), FEA hereby issues this Remedial Order.

I. REGULATORY BACKGROUND

The pricing rules applicable to the sale of domestic crude oil were originally promulgated on August 19, 1973 (38 FR 22538, August 22, 1973) by the Cost of Living Council ("CLC") pursuant to authority vested in it by the Economic Stabilization Act of 1970 as amended, 12 USC Section 1904, note ("Stabilization Act"). On December 27, 1973, the Federal Energy Office ("FEO") adopted CLC's pricing rules for petroleum products as part of what is now the FEA Mandatory Price Regulations. In CLC Order No. 47 (December 26, 1973), the Chairman of the Cost of Living Council delegated authority to the Administrator of the FEO to, among other things, "make determinations and take action with respect to Phase II, Phase III and Phase IV compliance and enforcement cases" received after December 21, 1973. Thus, the FEA is authorized to investigate and deal with

violations of CLC price regulations for petroleum products for that period of August 19, 1973 through December 27, 1973, as well as those violations of FEA regulations after December 27, 1973.

The pricing rules promulgated by the FEA on December 27, 1973 were reissued on January 14, 1974 (39 FR 1924, January 15, 1974) and, with certain amendments not relevant here, remained in effect until February 1, 1976 when the pricing rules applicable to the sale of domestic crude oil were changed to conform to the requirements of the Energy Policy and Conservation Act (P.L. 94-163, December 22, 1975).

II. APPLICABLE REGULATIONS

The prices for the first sale of domestic crude oil are determined under the CLC regulations pursuant to 6 CFR Sections 150.353 and 150.354 and under FEA regulations pursuant to Subpart D of Part 212, Title 10, CFR. "First sale" is defined, pursuant to 6 CFR Section 150.54(s) and 10 CFR Section 212.72, as the first transfer for value by the producer or royalty owner.

Pursuant to 6 CFR Section 150.352 (subsequently incorporated into FEA price rules as 10 CFR Section 212.31 and amended in a manner not relevant here), a producer is defined as: "... a firm or that part of a firm which produces crude petroleum or any firm which owns crude petroleum when it is produced."

6 CFR Section 150.353 initially established the ceiling price which producers could lawfully charge for "old" crude oil as:

> the sum of (i) the highest posted price at 6:00 a.m., local time, May 15, 1973, for that grade of crude petroleum at that field, or if there are no posted prices in that field, the related price for that grade of domestic crude petroleum which is most similar in kind and quality at the nearest field for which prices are posted; and (ii) a maximum of $.35 per barrel.

On December 19, 1973, 6 CFR Section 150.353 (subsequently incorporated into FEA price rules as 10 CFR Section 212.73) was amended to raise the amount permitted to be added to the May 15, 1973 posted price from a maximum of $.35 to a maximum of $1.35.

CLC Phase IV Petroleum Price Regulations and FEA Mandatory Petroleum Price Regulations, prior to their amendment on February 1, 1976 (41 F.R. 4931, February 3, 1976), required crude oil producers to determine the first sale price of domestic crude oil produced and sold from a specific property in accordance with the base production control level for that property, i.e., the crude oil produced and sold from the property in a specific month in 1972. Crude oil production which did not exceed the base production control level of the corresponding month in 1972 ("old" oil) was subject to the ceiling price rule, while crude oil production which exceeded the base production control level of a particular property and any deficiency which had accumulated could be sold without regard to the ceiling price as "new" oil. A corresponding amount of "released" crude oil, as defined, was also permitted to be sold without regard to the ceiling price. The sale of crude oil produced from a stripper well lease was exempt from price regulations (6 CFR Section 150.54(s);

10 CFR Sections 210.32 and 212.54).

On February 1, 1976 the price regulations for producers of domestic crude oil were amended to establish a two-tier pricing mechanism designed to result in a maximum weighted average first sale price ("composite price") in February 1976 of $7.66 per barrel for all domestic crude oil. Crude oil sold at the lower tier consists of "old" crude oil and pursuant to 10 CFR Section 212.73 is subject to a ceiling price of the highest posted price applicable to transactions in the same or nearest field for that grade of crude oil on May 15, 1973, plus $1.35 per barrel. Crude oil sold at the upper tier consists of "new" crude oil and, pursuant to 10 CFR Section 212.74, is subject to a ceiling price of the highest posted price applicable to September 1975 transactions in the same or nearest field for that grade of crude oil on September 30, 1975, less $1.32 per barrel, subject to adjustment in months subsequent to February 1976.

The determination of the quantity of crude oil which could be sold without regard to the ceiling price prior to February 1, 1976 and the quantity which may currently be sold pursuant to the upper tier ceiling price rule is made with reference to the production of crude oil from a specific property. The term "property" is defined in Section 212.72 as "the right to produce domestic crude oil, which arises from a lease or from a fee interest."

III. FACTS

A. Grigsby is the operator of a crude oil producing property known as the Heywood RA SUB drilling unit (also referred to as the Upper Heywood "A" RA SUB) located in the North

Jennings Field, Acadia Parish, Louisiana, as shown on the plats attached hereto as Exhibits A and A-1. The Heywood Unit, which encompasses tracts covered by five mineral leases, was created effective January 22, 1969 by Order No. 464-F-1 of the Commissioner of Conservation of the State of Louisiana (a copy of which is attached hereto as Exhibit B). The Commissioner's order pooled the separately owned tracts and leases within the unit area and provided that operations on and production from the drilling unit that was established would be considered operations on and production from each of the tracts within the unit and under the terms of each mineral lease affecting said tracts. The order designated Jack W. Grigsby as the unit operator and the Lucky Strike Well No. 1 as the unit well. From January 1969 until October 1974, the production of crude oil from the Heywood Unit was obtained by production from one well known as the Lucky Strike Well.

On June 26, 1974, Grigsby applied to the Commissioner of Conservation for permission to drill a substitute well for the Heywood Unit. By Order No. 464-F-2 dated July 26, 1974 (a copy of which is attached hereto as Exhibit C), the Commissioner authorized Grigsby to drill the Robert Leger Well No. 1 as the substitute well and ordered that the Heywood Unit be continued in effect. The Robert Leger Well was thereafter completed and began production on October 14, 1974. In the same month, Grigsby terminated crude oil production from the Lucky Strike Well and closed it. From October 14, 1974 until the present, the production of crude oil from the Heywood Unit has been obtained by production from the Robert Leger Well.

The following table illustrated Grigsby's production and sale

of crude oil from the Heywood Unit during the period of FEA's audit.

Month	1972	1973	1974	1975
January	4787.58		4235.25	7135.56
February	4827.10		3780.21	5830.82
March	5360.17		2518.51	5944.46
April	4417.97		6178.22	6144.63
May	7909.46		5312.75	5405.75
June	6958.09		4682.99	5960.67
July	6334.32		5155.84	
August	7400.30		3248.53	
September	6876.05	4101.22	5154.93	
October	6662.63	4747.92	33170.04	
November	6359.61	4263.51	6511.73	
December	5705.89	4602.92	7419.63	

The above crude oil volumes were sold either to Cities Service Oil Company or to Cities Service Pipe Line Company, the present purchaser. During the period September 1, 1973 to October 14, 1974, Grigsby charged and was paid the ceiling price for "old" crude oil. This price was approximately $4.27 per barrel from September 1, 1973 through December 18, 1973. On December 19, 1973 (the date of CLC's $1.00 increase in the ceiling price of old oil) the price per barrel increased to approximately $5.27 per barrel. On October 14, 1974, however, Grigsby began selling all of the Heywood Unit production as "new" crude oil, i.e., without respect to the ceiling price. Grigsby's sales of this production during the period October 14, 1974 through July 31, 1975 resulted in the recovery of the following amounts in excess of the ceiling price:

	Barrels Sold	Overcharge Per Barrel	Total Overcharge*
1974 October 14 - October 31	2129.77 @	$5.3606	$11,416.80
November	6511.73	5.8505	38.096.62
December	7419.63	6.0000	44,517.80
1975 January	7135.56	5.9993	42,808.32
February	5830.82	6.4000	37,317.25
March	5944.46	6.3879	37.972.81
April	6144.63	6.6 [illegible]3	40,795.78
May	5405.75	6.6500	35,948.22
June	5960.67	6.6403	39,580.56
July	5444.36	7.4000	40,288.27
TOTALS	57,927.38		$368,742.43

*The total overcharge figures may not extend exactly as the actual computations were based on per barrel overcharges carried to seven decimal places.

B. Grigsby is also the operator of a crude oil producing property known as the WLPE 41 7600' SU located in the West Pontchartrain East Block 41 Field, St. Charles Parish, Louisiana. During the period of FEA's audit, Grigsby sold the WLPE production to three purchasers: Shell Oil Company ("Shell") from September 1, 1973 through May 31, 1974; Stone Energy Company ("Stone") from June 1, 1974 through December 6, 1974; and Summit Gas Company ("Summit") from December 10, 1974 through July 31, 1975.

The West Pontchartrain East Block 41 Field is not specifically named in any price bulletin. Under the terms of a written contract dated June 11, 1971, however, Grigsby

agreed to sell the WLPE production to Shell at a price per barrel equal to Shell's posted price for Good Hope Field crude oil of like gravity in effect on the date of delivery, less 12c per barrel for transportation provided by Shell from the Pontchartrain field to Shell's facilities at Avondale, Louisiana (a copy of this contract is attached hereto as Exhibit D). With the exception of three purchases made in April 1972 (see Exhibit E attached), under this contract Shell paid Grigsby the posted price of $3.69 per barrel for 37.0° - 37.9° crude oil less 12c per barrel transportation, or the sum of $3.57 per barrel.

The June 11, 1971 contract remained in effect until July 1, 1972 when it was agreed that Shell would pay for the WLPE production at a flat price of $3.57 per barrel. (A copy of this contract is attached hereto as Exhibit F.) One June 21, 1972, Shell wrote Grigsby that the "establishment of a flat price for this production does not represent a price change, but, eliminates reference to gravity or transportation, at the owners' request." (See Exhibit G attached.)

By letter dated April 12, 1973, the price clause of the 1972 agreement was amended to provide that Shell would pay a flat $3.75 per barrel, which price would fluctuate with any changes in the arithmetic average of the prices posted for 40° gravity crude oil by Shell for the Good Hope field, Texaco for the Caillou Island field, Exxon for the Avery Island field and Gulf (which does not list specific fields in Louisiana) for its Ostrica, Louisiana terminal (a copy of this letter agreement is attached hereto as Exhibit H). Shortly thereafter, each of the specified firms issued price bulletins providing for a posted price of $4.00 per barrel for 40.0° gravity crude oil, less 2c per degree reduction for each full degree of

gravity below 40.9. These price bulletin s were the highest posted prices in effect on May 15, 1973. Each bulletin stated that the prices included the cost of transportation to the purchaser's receiving facility and were subject to reduction if such transportation were provided by the purchaser (a copy of each respective price bulletin is attached hereto as Exhibits I-1, 2, 3 and 4).

During the period September 1, 1973 through July 31, 1975, Grigsby sold 286,370.91 barrels of "old" crude oil from the WLPE 41 7600' SU. In each instance, the oil sold was between 37.0°and 37.9° gravity and barge transportation from the field was provided by the purchaser. In each instance, however, Grigsby charged and the purchaser paid the May 15, 1973 posted price of $4.00 per barrel for 40.0° gravity oil (plus the sums authorized by 6 CFR 150.353 and 10 CFR 212.73(b)) without deduction for transportation. A determination of the highest posted price on May 15, 1973 pursuant to CLC and FEA regulations for 37° crude oil produced and sold at the Pontchartrain field (based on the price bulletins referred to above) results in the sum of $3.82 per barrel arrived at as follows:

Posted price for 40.0° crude oil delivered	$4.00
Less 2c per degree gravity below 40.9	.06
Less transportation provided by purchaser	.12
	$3.82

A computation of the ceiling price pursuant to CLC and FEA regulations for "old" 37° gravity crude oil produced and sold

at the Pontchartrain field results in the sum of $4.17 per barrel prior to December 21, 1973 ($3.82 + .35) and the sum of $5.17 per barrel on and after December 21, 1973 ($3.82 + 1.35). Grigsby's sale of old oil at a price per barrel of $4.35 and $5.35 resulted in recovery of the following amounts in excess of the ceiling price:

	Period		Barrels Sold	Overcharge Per Barrel	Total Overcharge
Shell Oil Co.	1973	Sept.	21,543.00	@ $.18	$3,877.74
		Oct.	19,977.00		3,595.86
		Nov.	6,719.00		1,209.42
		Dec.	20,916.76		3,765.02
	1974	Jan.	11,885.08		2,139.31
		Feb.	13,198.44		2,375.72
		Mar.	20,860.58		3,754.90
		April	16,224.66		2,920.44
		May	9,353.50		1,683.63
Stone Energy Co.	1974	June	7,373.26		1,327.19
		July	19,004.80		3,420.86
		Aug.	16,973.00		3,055.14
		Sept.	16,396.00		2,951.28
		Oct.	6,443.00		1,159.74
		Nov.	6,456.00		1,162.08
		Dec. 1-Dec. 6	5,524.00		994.32
Summit Gas Co.		Dec. 6-Dec. 31	7,430.25		1,337.44
	1975	Jan.	1,144.03		205.93
		Feb.	2,703.82		486.69
		Mar.	17,280.91		3,110.56
		April	11,242.89		2,023.72
		May	5,799.98		1,044.00
		June	5,541.60		997.49
		July	16,379.35		2,948.28

C. In the Notice issued to Grigsby, FEA alleged that Grigsby improperly priced the crude oil produced from the Heywood Unit during the period from October 1974, when the Robert Leger well was completed and the Lucky Strike well was closed, through July 1975 by selling all of the Heywood Unit production as "new" oil. Since the order the established the drilling unit signifies one right to produce crude oil from an area that had previously existed as separate rights in several lease and fee interests, the Notice stated that Grigsby would be entitled to charge new oil prices only if current production and sale of crude oil from the unit exceeded the property's base production control level ("BPCL") and any current cumulative deficiency. The Notice further alleged that the production and sale of crude oil from the Heywood Unit did not exceed the BPCL and the cumulative deficiency in any month subsequent to April 1974 and that all of the Heywood Unit production during the period October 1974 through July 1975 was old oil and subject to the ceiling price limitation specified in Section 212.73.

With respect to the WLPE 41 7600' SU, FEA alleged that Grigsby computed ceiling prices for old oil by reference to a 1973 contract which provided for a price based on 40° gravity oil, which was higher than the applicable posted prices for 37.0° - 37.9° gravity crude oil actually being produced and sold and that Grigsby added the cost of transportation to the price of the oil when the applicable posted prices already included the cost of providing that service to the purchaser. Based upon information obtained from Grigsby's records, FEA alleged total overcharges of $122,189.82 during the period from September 1, 1973 through July 31, 1975.

IV. DISCUSSION

A. *Grigsby's Responses*

In response to the Notice, Grigsby argued that there has been no violations of the Mandatory Petroleum Price Regulations for the following reasons:

1. With reference to the Heywood Unit, Grigsby contends that the definition of "property" set forth at 10 CFR 212.72, as interpreted by FEA Ruling 1975-15, contravenes the Emergency Petroleum Allocation Act of 1973.

2. Grigsby states that he has sold and marketed the oil from the Heywood Unit in his own name, and although he received 100% of the revenues which were obtained as a result of the alleged overcharges, he thereafter distributed the same to himself and the other owners of the production.

3. With reference to the WLPE 41 7600' SU, Grigsby states that the contracts in effect during the period of FEA's audit do not refer to transportation costs and that the agreed price is F.O.B. at Grigsby's Central Platform facilities in the Pontchartrain field.

4. Grigsby further argues that the ceiling price for old crude oil in South Louisiana is properly computed at $4.35 per barrel prior to December 21, 1973 and $5.35 per barrel thereafter, as reflected in the contracts. (See Exhibits J and K attached.)

5. With regard to the gravity differential, it is argued that the June 21, 1972 contract, which was in effect prior to the

implementation of price controls, as well as the September 6, 1973 amendment thereto (Exhibit K), provided for a flat price for the Pontchartrain crude oil equal to the posted price of 40.0° gravity crude in the nearby Good Hope field that was to be paid regardless of the gravity of the crude oil actually produced and sold.

V. FEA'S ANALYSIS AND DETERMINATION OF THE ISSUES

A. As FEA stated in the Notice, the definition of "property" has been interpreted in FEA Ruling 1975-15. The Ruling clarifies those FEA regulations which utilize a property concept based upon one's right to produce crude oil in order to properly apply FEA's price rules for such oil and makes it clear that a "new" well does not necessrily result in "new" oil:

> . . .Under no circumstances does the mere drilling of a new well automatically establish the production as new crude oil. Production from a property qualifies as new crude oil only if in excess of the property's 1972 production levels and any current cumulative deficiency . . . . (40 F.R. 20831, Sept. 4, 1975)

As noted previously, the Heywood Unit has been in existence since January 1969 and crude oil was produced and sold from the unit during each month of 1972. Grigsby does not dispute the fact that the order establishing the unit signifies one right to produce crude oil from an area that had previously been the subject of separate rights in several lease and fee interests. Neither does Grigsby dispute the fact that the two-tier pricing system from its inception required producers

to measure current monthly production and sale of crude oil from a property against the amount of crude oil produced and sold from that same property in the same month of 1972, in order to determine the amount of current crude oil production which would be subject to the ceiling price rule. The concept of "property," as well as the entire operating principle of Subpart D, is intended to provide incentives to increase actual production levels of domestic crude oil over those of 1972. The concept was and is not intended to be one that would allow an operator to create "new" oil by merely closing one producing well and drilling another when both are located on the same property.

Grigsby acknowledges that Ruling 1975-15 specifies that the mere drilling of a new well on a particular property does not automatically establish the production from that well as new oil, whether from the same or a different reservoir. He argues, however, that such application contravenes the objectives set forth in Section 4(b)(1) D and H of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. Section 753 (b) (1) D and H).

FEA believes that the definition of property is entirely consistent with the two objectives cited as well as with the remaining seven objectives of the Act. By disregarding the fact that the Robert Leger well was and is a *substitute* well and assuming solely for illustration that the oil produced by the Leger well was from a newly discovered reservoir underlying the Heywood Unit, it can be seen that the treatment of either the well or the reservoir as a property different from the Heywood Unit would have been inconsistent with the objective of the released oil concept. Under the concept of "released" crude oil, that part of the base production control level crude

oil for a property in a particular month that was equal to the new crude oil produced and sold from the same property in the same month could be classified as released crude oil and could also be sold without respect to the ceiling price. As applied to a Heywood Unit consisting of two wells, one producing from a newly discovered reservoir and one from a previously producing reservoir, FEA's definition of property would enable Grigsby to measure the amount of oil produced in a current month by totaling the production from the two reservoirs. To the extent that the current production of the two reservoirs exceeded the production from the one reservoir in the same month of 1972 (the BPCL), the excess would have been new crude oil and a corresponding amount of BPCL crude oil would have been released crude oil, irrespective of whether or not the excess was produced solely from the new reservoir. A property application that treats each reservoir as a separate property, however, results in all of the production from one well being classified as new oil and all of the production from the other well, not in excess of the BPCL, being classified as old oil.

An additional purpose is served by FEA's property concept that has relevance to the facts of this case. Establishing a BPCL and measuring production and sale from a property permits the accurate reflection of the total activity of the operating unit for the period in question, i.e., it permits the measurement of actual gain or loss in crude oil produced and sold. Such treatment avoids the creation of new crude oil from a single property by the simple expedient of drilling a new well and terminating production from an existing well. Although Grigsby alleges tht such action was jusitfied because the Robert Leger well produces crude oil from a reservoir that is separate and distinct from the reservoir previous-

ly produced by the Lucky Strike well, Grigsby has submitted no information that would explain the closing of the Lucky Strike well when it had produced more than 50,000 barrels of crude oil in the previous twelve month period and was continuing to produce until it was closed.

Grigsby also contends that he is not in violation of FEA regulations because he has sold and marketed the oil from the Leger well in his own name, for the account of himself and the other owners of interest in said oil, and although he has received 100 percent of the proceeds, he has distributed, or holds for distribution, the same, to himself and the other owners of interest. Apparently Grigsby's argument is directed primarily to his liability for refunds relating to his sales of the royalty and other non-operating interest owners' share of the crude oil and is not a denial of FEA's authority to require refunds on sales of crude oil made in violation of its regulations irrespective of the disposition of the excess proceeds. Grigsby's argument is also apparently directed to overcharges disbursed prior to receipt of the Notice in view of the fact he has advised FEA he will continue to charge new oil prices but will place the excess amounts in escrow pending action by the FEA.

FEA regulations permit the flexibility of directing the agency's compliance effort toward non-operating interest owners, e.g., royalty owners. However, in the present situation, it is more appropriate to require the refunds from Grigsby who actually produced, marketed and sold the crude oil, recognizing that as to that part of the refund relating to sales of the non-operating interest owners' product, Grigsby has acted and continues to act as the agent for the owners of interest and can seek recoupment for the overcharges disbursed to them.

B. With reference to the WLPE 41 7600' SU, Grigsby first takes issue with the allegation in the Notice that Grigsby contracted to add the cost of transportation to the cost of oil sold and argues that the contracts under which the oil is sold do not refer to transportation. Grigsby then alleges that the ceiling price for old crude oil in South Louisiana is properly computed at $4.35 per barrel prior to December 21, 1973 and $5.35 per barrel thereafter based on contracts that were in effect on May 15, 1973 as well as after the implementation of price controls which specified an agreed price per barrel that was to be paid regardless of the gravity of the crude oil actually produced and without deduction for transportation provided by the purchaser.

Since their inception, CLC and FEA price regulations have employed crude oil posted prices as references for determining ceiling prices. The ceiling price for old crude oil, as previoulsy noted, must be computed by use of "the highest posted price at 6 a.m., local time, May 15, 1973, for that grade of crude oil at that field, or if there are no posted prices in that field, the related price for that grade of domestic crude oil which is most imilar in kind and quality at the nearest field for which prices are posted. . . ." 10 CFR 212.73(b). In the preamble to the regulations implementing the Energy Policy and Conservation Act in 41 F.R. 4931 (Feb. 3, 1976), FEA announced its determination to continue use of the ceiling price rule in order to maintain an average first sale price for all old crude oil of $5.35 per barrel:

> Depending on the highest May 15, 1973 posted price in each field for the grade and quality of crude oil concerned, the price of old crude oil varies from field to field, and may in isolated in-

stances be as low s $3.50 per barrel, or as high as $7.00 per barrel. Price differentials reflect the different values of crude oils depending upon their refinery yield characteristics, location with respect to markets, gravity and sulfur content, and other relevant factors.

****

Use of the current ceiling price rule also avoids the many complications that might be involved were the FEA to prescribe a ceiling price without regard to historical prices, including the necessity of having to prescribe adjustments to reflect price differentials for location and quality. Existing price differentials for old crude oil will, therefore, be maintained as of May 15, 1973.

The continued use of prices posted in various fields on May 15, 1973 as a base to establish a ceiling price for old crude oil provides FEA with the ability to measure current old crude oil prices without the difficulties described above. However, information derived both from the comments and from investigations conducted by FEA's Office of Compliance in its examination of crude oil pricing suggests that while May 1973 posted prices often included such services by the seller as cleaning and measuring of crude oil and its delivery to a common carrier pipeline or truck, a tendency to reduce these historical services accompanying production and sale of crude oil with no downward adjustment of the posted price has become more and more pronounced since the advent of the price regula-

> tions. FEA has discovered, for example, cases in which producers have sought to require purchasers of crude oil to pay transportation charges from the lease to the point at which the crude oil is delivered to the common carrier, notwithstanding the fact that such services were included as part of the posted price on May 15, 1973. Accordingly, FEA wishes to make clear that in establishing a lower tier ceiling price by reference to a May 15, 1973 posted price, the price currently charged shall include all services that were included in the reference posted price on May 15, 1973. This is consistent with FEA's uniform policy that a reduction in services without a corresponding reduction in price constitutes an unlawful means to obtain a price in excess of that permitted by the price regulations.

Grigsby does not dispute the fact that the price bulletins issued by Shell, Texaco, Exxon and Gulf all quote prices for crude oil delivered to the purchaser and that these prices were subject to reduction if transportation were provided by that purchaser. Grigsby's contention is that he may continue to charge a posted price for 40.0° gravity oil which includes transportation from the lease tanks to the purchaser's receiving terminal, notwithstanding the fact that such transportation services have never been provided, because he did so prior to and after May 15, 1973 under the terms of his contracts with the purchasers. 10 CFR 212.73, however, does not establish a ceiling price by reference to the terms of contracts, plus a maximum of $1.35. The requirement of the ceiling price rule is that a producer establish a ceiling price by reference to the hishest posted price for crude oil, plus a maximum of $1.35.

As stated above, in establishing a ceiling price by reference to a May 15, 1973 posted price, "the price currently charged shall include all services that were included in the reference posted price on May 15, 1973." Since Grigsby has never transported the oil from the lease tanks to the purchasers' receiving facilities and has always produced and sold 37° gravity oil, the ceiling price is properly computed by reference to the aforesaid May 15, 1973 posted prices for 37.0° - 37.9° gravity crude oil, less 12c per barrel for transportation from the Pontchartrain field deducted by the purchaser on May 15, 1973, plus a maximum of $1.35 per barrel. Since each of the applicable price bulletins quotes a price of $3.94 per barrel for 37.0° - 37.9°gravity oil, use of any one results in a ceiling price of $4.17 prior to December 21, 1973 and $5.17 thereafter.

In the Notice issued to Grigsby, FEA alleged overcharges on old oil sales in the amount of $122,189.82 based on information obtained from Grigsby's records that indicated an 18c per barrel overcharge on more than 677,000 barrels sold from the WLPE 41 7600' SU. Although Grigsby has not taken issue with FEA's calculation of old oil volumes sold during the audit period, FEA's re-examination and review has disclosed old oil sales in the amount of 286,370.91 barrels. Accordingly, since the Notice deals with overcharges resulting from Grigsby's computation of the ceiling price on sales of old crude oil from the WLPE 41 7600' SU, FEA has recomputed overcharges of $51,546.76 in accordance with the volumes of old oil set forth in the Table on pages 8 and 9.

VI. FINDINGS OF FACT

1. Grigsby is the operator of two crude oil producing prop-

erties identified as the Heywood RA SUB, North Jennings Field, Acadia Parish, Louisiana and the WLPE 41 7600' SU, West Pontchartrain East Block 41 Field, St. Charles Parish, Louisiana.

2. The base production control level (BPCL) for the Heywood Unit and the volumes of crude oil produced and sold during the period of FEA's audit are shown in the Table on pages 4 and 5 hereof.

3. Production from the Heywood Unit had fallen below the BPCL subsequent to April 1974, the first month in which new crude oil had been produced and sold, resulting in the property having a cumulative deficiency.

4. Between October 14, 1974 and July 31, 1975, Grigsby charged Cities Service Oil Company and Cities Service Pipe Line Company the ceiling price for the Heywood Unit production plus the additional sums shown in the Table on pages 5 and 6 hereof. During this time, crude oil produced and sold from the Heywood Unit did not exceed the property's BPCL and the cumulative deficiency.

5. Since June 11, 1971, Grigsby has sold the production from the WLPE 41 7600' SU pursuant to the terms of written contracts. Since September 6, 1973, the price clauses of such contracts have provided that the purchaser would pay a flat price for such production at the rate of $4.35 per barrel prior to December 21, 1973 and $5.35 per barrel thereafter.

6. On May 15, 1973, the highest posted price for the WLPE production, not including the cost of transportation, was the

sum of $3.82 per barrel. Since September 1, 1973 Grigsby has charged the sum of $4.00 per barrel for the WLPE old crude oil production, plus the sums authorized by 6 CFR 150.353 and 10 CFR 212.73, resulting in the recovery of the additional sums shown in the Table on pages 8 and 9.

VII. CONCLUSIONS OF LAW

1. Grigsby's production of crude oil from the Heywood Unit and the WLPE 41 7600' SU qualifies Grigsby as a "producer" as that term is defined in 10 CFR 212.31 and the first sale of such crude oil is subject to the limitation imposed by 6 CFR 150.354 and Subpart D of 10 CFR Part 212.

2. Grigsby has, in first sales of the Heywood Unit crude oil to Cities Service Oil Company and Cities Service Pipe Line Company from October 14, 1974 to July 31, 1975, charged prices in excess of the ceiling price for "old" crude oil, in violation of 10 CFR 212.73.

3. Grigsby has, in first sales of the WLPE 41 7600' SU crude oil to Shell from September 1, 1973 to May 31, 1974, Stone from June 1, 1974 to December 6, 1974 and Summit from December 10, 1974 to July 31, 1975, charged prices in excess of the ceiling price for "old" crude oil, in violation of 6 CFR 150.354 and 10 CFR 212.73.

4. As a result of being charged in excess of the ceiling prices for crude oil from September 1, 1973 to July 31, 1975, Cities Service Oil Company and Cities Service Pipe Line Company have paid $368,742.43, Shell has paid $25,322.04, Stone has paid $14,070.61 and Summit has paid $12,154.11 in excess of the lawful prices for such crude oil.

VII. ORDER

Grigsby is hereby ordered to take the following remedial action:

1. Reduce the prices charged for lower-tier and upper-tier crude oil produced from the Heywood Unit and the WLPE 41 7600' SU to lawful prices, determined pursuant to 10 CFR 212.73 and 212.73.

2. Make restitution by refund of $368,742.43 to Cities Service Oil Company and Cities Service Pipe Line Company, $25,322.04 to Shell, $14,070.61 to Stone and $12,154.11 to Summit, representing sums charged by Grigsby for "old" crude oil from the Heywood Unit and the WLPE 41 7600' SU in excess of those permitted by 6 CFR 150.354 and 10 CFR 212.73 during the period September 1, 1973 through July 31, 1975.

3. Recalculate, pursuant to 10 CFR 212.73, the ceiling price for sales of "old" crude oil from the Heywood Unit and the WLPE 41 7600' SU during the period August 1, 1975 through January 31, 1976 and make restitution by refund to the purchaser of those amounts which represent sums charged by Grigsby in excess of the ceiling price during this period.

4. Recalculate, pursuant to 10 CFR 212.73 and 212.74, the ceiling prices for sales of lower-tier and upper-tier crude oil produced from the Heywood Unit and the WLPE 41 7600' SU for the period February 1, 1976 to the date of receipt of this Order and make restitution by refund to the purchaser of those amounts which represent sums charged by Grigsby in excess of the ceiling price during this period.

5. Compute interest on the aforementioned refunds in accordance with the following rates and make immediate restitution of such amounts to each purchaser: (a) for amounts representing overcharges outstanding prior to July 1, 1975, a rate of 6% per annum; (b) for amounts representing overcharges outstanding from July 1, 1975 to January 31, 1976, a rate of 9% per annum; (c) for amounts outstanding after February 1, 1976, a rate of 7% per annum.

6. Refunds will be made either by check or by means of credit entries on future billings at the purchaser's option. All refunds by check or credit entry must be made within 180 calendar days after receiving this Remedial Order. As an additional requirement, at least one-third of the refund due each individual purchaser must be refunded within 60 days and at least two-thirds of the refund due each individual purchaser must be refunded within 120 days after receiving this Remedial Order.

7. The above refunds shall be accompanied by a written explanatory statement to each purchaser identifying such refunds as an act undertaken by Grigsby in compliance with this Order. Such statement shall also advise the purchaser that such refund constitutes a decrease in product costs for purposes of FEA regulations applicable to the purchaser.

8. Grigsby shall maintain separate records showing its compliance with items (1) through (6) of this Order. Such records, as a minimum, shall contain compliance actions taken, dollar amounts of such actions, dates of actions and other evidence of restitution.

9. Upon full compliance with the terms of this Order, Grigs-

by shall submit to the FEA copies of the records, identified in item 8 of this Order, along with a written statement certifying that all the requirements of this Order have been met. This final report shall be due within 10 days from the date Grigsby completes compliance with this Order. Additionally, if Grigsby elects to accomplish the required refunds over a period exceeding 60 days, in accordance with item 6 of this Order, periodic written reports are to be filed with the FEA as the refunds are accomplished. The first periodic report (if required) must be filed within 70 days after Grigsby receives this Order. The second periodic report (if required) must be filed with 130 days after Grigsby receives this Order. These periodic reports will contain a statement of the refunds which have been accomplished as of the date of the report, including the dollar amount of each refund, the person to whom each refund was made and the date of the refund. All reports and notifications shall be made to:

Mr. L. K. Jones, Area Manager
Federal Energy Administration
Suite 1930, International Trade Mart Bldg
No. 2 Canal Street
New Orleans, Louisiana 70130

IX. PROCEDURE AND APPEAL

This Remedial Order shall become effective when the time limit for filing an appeal from the Remedial Order has expired. Pursuant to 10 CFR 205.108, a written appeal from this Remedial Order may be filed within ten days of service. If this Order was served by regular U. S. mail, you are accorded an additional three days within which to file an appeal, pursuant to 10 CFR 205.5(c). Pursuant to Section 205.172

(b), you may request that a conference or a hearing be held in connection with your appeal. At such conference or hearing you may be accompanied or represented by counsel.

Notwithstanding the filing of an appeal, this Order shall become effective when the time for filing an appeal expires unless a Stay is granted pursuant to the provisions of Subpart I of 10 CFR 205.

A written appeal and correspondence relating to this Order shall be addressed to:

Director, Office of Exceptions & Appeals
Federal Energy Administration
2000 M Street, N. W.
Washington, D.C. 20461

Failure to comply with this Order shall constitute a separate violation for each day that such non-compliance continues and shall subject Grigsby to the penalties and sanctions provided in 10 CFR 205.202. Grigsby is also subject to penalties and sanctions described in that section for each day that the violations described in this Order have occurred.

If the FEA considers it appropriate or advisable to compromise any civil penalties for which Grigsby may be liable, the FEA will so advise, pursuant to 10 CFR 205.202(c) (2).

Sincerely,

s/ Wayne E. Gifford
Wayne E. Gifford
Deputy Regional Administrator

82-1552

NO.

Office-Supreme Court, U.S.
FILED
MAR 19 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK W. GRIGSBY,

Petitioner

versus

DEPARTMENT OF ENERGY,
DONALD P. HODEL and
THE UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES VOLUME III—APPENDICES "L-R"

MILLING, BENSON,
WOODWARD, HILLYER,
PIERSON & MILLER

OF COUNSEL

BLANCHARD, WALKER,
O'QUIN & ROBERTS

OF COUNSEL

H. H. HILLYER, JR.
(Counsel of Record)
1100 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3333

MARLIN RISINGER, JR.
W. MICHAEL ADAMS
15th Floor, First National
Bank Tower
P.O. Drawer 1126
Shreveport, Louisiana 71163
Telephone: (318) 221-6858

ATTORNEYS FOR
JACK W. GRIGSBY,
Petitioner

MARCH, 1983

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

Page

Appendix L—Order Denying Rehearing.....A-115
Appendix M—Petition For Rehearing.....A-116
Appendix N—TECA Opinion.....A-121
Appendix O—Excerpts From Reply Brief of Jack W. Grigsby.....A-124
Appendix P—Excerpts From Original Brief of Jack W. Grigsby.....A-129
Appendix Q—Judgment of District Court.....A-136
Appendix R—Opinion of District Court.....A-137

APPENDIX "L"

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-81

JACK W. GRIGSBY,
Plaintiff-Appellant,

v.

DEPARTMENT OF ENERGY and JAMES EDWARDS, Secretary of Energy,
Defendants-Appellees,

and

THE UNITED STATES OF AMERICA,
Counterclaimant-appellee.

Before BROWN, HEMPHILL and POINTER, Judges.

ORDER

Upon consideration of Appellant's petition for rehearing, It is

ORDERED that said petition for rehearing is Denied. The mandate will issue March 1, 1983.

FOR THE COURT:

DONNA M. BOLD, Clerk

By: Patricia L. Krosel
Patricia L. Krosel
Chief Deputy Clerk

February 22, 1983

APPENDIX "M"

IN THE
TEMPORARY EMERGENCY COURT OF APPEALS

OF THE UNITED STATES

NO. 5-81

JACK W. GRIGSBY,

Appellant

versus

DEPARTMENT OF ENERGY,
JAMES EDWARDS and
THE UNITED STATES OF AMERICA,

Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

PETITION FOR REHEARING

COMES NOW Jack W. Grigsby ("Grigsby"), appellant, and petitions the Court for a rehearing of the decision of the Court contained in its Opinion issued January 18, 1983, and, in support of such petition, shows:

1. The decision of this Court, it is respectfully submitted, is in direct conflict with the decision of the Supreme Court of the United States in *Burlington Truck Lines v. United States*, 371 U.S. 156. 168-169 (1962) ("...The courts may not accept appellate counsel's post hoc

rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself ..."). See also: *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 631, n. 31 (1980). It is also in conflict with decisions to the same effect by other Courts of Appeals, notably the Fifth Circuit. *Real v. Simon*, 514 F.2d 738, 739 (CA 5 1975); *Pennzoil v. FPC*, 534 F.2d 627, 631 (CA 5 1976); *Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*, 638 F.2d 1255, 1259-60 (CA 5 1981).

This conflict results from the fact that this Court's decision affirms the District Court which, in turn, had affirmed the agency order *on grounds never articulated in the agency order under review.* Thus, the District Court was acting directly contrary to the Supreme Court's ruling in *Burlington Truck Lines.* The fact that this Court in *Grigsby I* had so instructed the District Court does not make the clear error of the District Court any less real; it only makes apparent the clear error of *Grigsby I* in instructing the District Court to decide the case on grounds not articulated by the agency.

The Opinion does not disclose the reason for the Court's apparent disregard of *Chenery, Burlington Truck Lines* and their progeny.

2. The Opinion herein appears to rest primarily on its last two grammatical paragraphs (slip opinion, pp. 2-3) which state that Grigsby had been unable to establish at the trial that production from the Robert Leger Well No. 1

had been "treated" as production from a separate property prior to the issuance of Louisiana Office of Conservation Order No. 464-K; this because DOE was "entitled to rely on earlier unit classifications by the regulatory state." Not only does this supply grounds for the agency order never articulated in the order, but it is a fact that prior to completion of the administrative process, the agency had in its possession Order No. 464-K and had all the information showing that the production from the Robert Leger No. 1 Well was production from a different property *so that the agency, in its final order, could not properly have relied on the earlier LOC orders* (see Decision on Appeal, R. 23, 28). Grigsby was correct, *in hindsight,* at the time of his "treatment" of Robert Leger well production as "new oil" by so certifying; he was equally correct, *in hindsight,* at the time of the agency's final order. So the agency's final order may not stand, supported, as it is, only by grounds never stated by the agency but suggested by the *post hoc* argument of appellate counsel, and articulated for the first time on rehearing in *Grigsby I.*

3. The decision of this Court, it is respectfully submitted, is in error in considering *Grigsby I* to be in any way binding upon this Court in *Grigsby II. Grigsby I* was clearly erroneous in instructing the District Court to decide the remanded case on grounds never articulated by the agency's order under review. *Burlington Truck Lines, supra.* When an original decision is clearly erroneous, the law of the case may be modified. *Major v. Benton,* 647 F.2d 110, 112 (CA 10 1981). Further, DOE was precluded on remand from claiming that the instructions of *Grigsby I* were binding on this Court by assurances to the Supreme Court of the United States that the *Grigsby I* instructions were interlocutory only, and not binding. *Cf. Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510, 512-513 (CA 3 1953); *Jett*

v. Zink, 474 F.2d 149, 155 (CA 5 1973).

(CONCLUSION)

4. Given the fact that, on the face of the record, the instructions of *Grigsby I* bear no resemblance to the grounds relied upon by the agency order under review, it is respectfully submitted that this Court's decision in *Grigsby II* is, on its face, in conflict with the settled jurisprudence of the Supreme Court of the United States and is thus clearly erroneous. A rehearing should be granted.

WHEREFORE, Jack W. Grigsby, appellant, prays as follows:

a. That a rehearing be granted herein;

b. That this Court's decision of January 18, 1983, be vacated;

c. That the Opinion dated January 18, 1983, be withdrawn;

d. That there be judgment reversing the judgment of the District Court and reversing and vacating the Remedial Order and ordering the dismissal of the agency proceedings; or, alternatively, reversing the judgment of the District Court and remanding the case for further proceedings.

All of which is respectfully submitted.

OF COUNSEL:

BLANCHARD, WALKER,
O'QUIN & ROBERTS

MARLIN RISINGER, JR.
W. MICHAEL ADAMS
15th Floor, First National
Bank Tower
P.O. Drawer 1126
Shreveport, LA 71163
Telephone: (318) 221-6858

OF COUNSEL:

MILLING, BENSON,
WOODWARD, HILLYER,
PIERSON & MILLER

H. H. HILLYER, JR.
J. HENRY PHILLIPS III
1100 Whitney Building
New Orleans, LA 70130
Telephone: (504) 581-3333

By: /S/H. H. HILLYER, JR.

ATTORNEYS FOR
JACK W. GRIGSBY,
APPELLANT

APPENDIX "N"

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-81

JACK W. GRIGSBY, PLAINTIFF-APPELLANT,

vs.

DEPARTMENT OF ENERGY and JAMES EDWARDS,
Secretary of Energy, DEFENDANTS-APPELLEES,

and

THE UNITED STATES OF AMERICA,
COUNTERCLAIMANT-APPELLEE.

On Appeal From The United States District Court
Western District of Louisiana
(Civil Action No. 770258-S)

Argued: January 7, 1983 Decided: January 18, 1983

H. H. HILLYER, JR., with whom J. Henry Phillips III of the same firm, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, Louisiana; and Marlin Risinger, Jr. and W. Michael Adams, of the firm, Blanchard, Walker, O'Quin & Roberts, Shreveport, Louisiana, of counsel, were on the brief for the Appellant.

BARBARA WARD, Department of Justice, Washington, D.C., with whom J. Paul McGrath, Assistant Attorney General, and Dennis G. Linder of the same agency; and Daniel F. Shea and Larry Ellsworth, of Counsel, Department of Energy, Washington, D.C., were on the brief for

the Appellees.

Before BROWN, HEMPHILL and POINTER, Judges.

PER CURIAM:

This case has been before this Court on appeal once before in *Grigsby v. Doe*, 585 F.2d 1069, opinion on rehearing at 585 F.2d 1080 (TECA 1978), which will be referred hereafter as *Grigsby I*. The salient facts are stated there and need not be repeated. On rehearing, this Court held that the production from Robert Leger Well No. 1 was entitled to be treated as "new" oil, on and after June 24, 1976. This result followed from the fact that official recognition and unitization as of that date by the Louisiana Office of Conservation (LOC) of the Upper Heywood "A" Sand, Reservoir A, Sand Unit B (Upper Heywood), as a unit separate from the Heywood Sand, Reservoir A, Sand Unit B (Heywood), brought it within DOE's then definition of "separate property." However, the matter was remanded to the trial court for trial on a disputed material factual issue. That issue was whether the Upper Heywood A reservoir had been treated as part of the same unit which covered the Heywood reservoir prior to June 24, 1976, or whether it had been treated as a separate unit before that date. On remand, appellant was unable to carry his burden to show separate unit treatment of the Upper Heywood Reservoir A, as found by the district ccourt. Consequently, the Robert Leger Well No. 1 production before June 24, 1976 should have been priced as "old" oil by appellant.

A close examination of this appeal reveals that appellant does not seek review of any error made by the district court except insofar as the district court complied with this Court's directions on remand. Appellant actually

seeks review of the decision by this Court in *Grigsby I*, claiming that the instructions therein to the trial court were erroneous. The prior holdings of this Court are the law of this case, and were properly followed by the district court.

More importantly, we believe the holdings in *Grigsby I* were and remain correct. The prior opinion stated that the need for certainty and finality in the enforcement of price control regulations militated against retroactive application of the LOC's subsequent separate unitization and held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact.

Grigsby I provided appellant with an opportunity, albeit limited, to establish that the Robert Leger Well No. 1 had been treated as a separate property prior to the state's reclassification, but appellant was unable to do this on remand.

For the foregoing reasons, the decision appealed from is AFFIRMED.

APPENDIX "O"

IN THE
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

NO. 5-81

JACK W. GRIGSBY,
Appellant

versus

DEPARTMENT OF ENERGY,
JAMES EDWARDS and
THE UNITED STATES OF AMERICA,
Appellees

REPLY BRIEF OF JACK W. GRIGSBY, APPELLANT

MAY IT PLEASE THE COURT:

The "Brief of the Federal Government, Appellees" (for convenience, "DOE"), responding to the original brief of Jack W. Grigsby, Appellant ("Grigsby"), has now been filed. In reply to DOE, Grigsby will deal with the points made by DOE in reverse order.

1. DOE'S REPRESENTATION TO THE SUPREME COURT PRECLUDED IT FROM ASSERTING THAT THE GRIGSBY INSTRUCTIONS WERE BINDING ON REMAND.

DOE does not deny that its premier argument

against certiorari (quoted at DOE Brief, p. 14) was exactly as stated by Grigsby (Grigsby Brief, p. 21); that is, that this representation "was a clear reassurance to the Supreme Court that the instructions were neither 'final' nor binding on the District Court." Nor does it question the law announced in the authorities cited by Grigsby (Grigsby Brief, pp. 21-22), typified by *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 512-513 (CA 3 1953). Instead, the defendants' position is that, granting the meaning and effect of the premier representation, other representations were made on which the Supreme Court *might* have relied.

This begs the question. Having made the representation and succeeded in averting issuance of the writ, DOE was then precluded from denying the verity of the representation. The fact that DOE may have had its fingers crossed (figuratively) when it made its original representation, does not excuse it from the *Scarano* rule. Given the Supreme Court's known aversion to issuing certiorari respecting interlocutory orders, it was unnecessary for that Court to read beyond the quoted, and first, representation of the Solicitor General's Brief in Opposition.

The result of the foregoing is that the District Court was not, as a matter of law, bound to follow the *Grigsby*[1] instructions, but was free to decide, in the words of the Solicitor General, that "... under Louisiana law and FEA regulations, the Leger well always was producing from a new 'property' and thus rule in favor of [Grigsby]...." But the District Court adopted DOE's argument that it *was* so

[1] *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), sometimes herein referred to as "*Grigsby-I.*"

bound. In so doing, the District Court's decision was clearly erroneous.

2. THIS COURT'S INSTRUCTIONS IN *GRIGSBY I* REQUIRED THE LOWER COURT TO AFFIRM THE AGENCY'S ORDER ON GROUNDS NOT ARTICULATED BY THE AGENCY AND WERE, THEREFORE, CLEARLY ERRONEOUS.

Again, DOE's argument (DOE Brief, pp. 12-13) appears to concede (as it must) that the grounds upon which *Grigsby-I* required the District Court to decide the "property" issue were grounds not articulated in the agency order under review. Indeed, none of the grounds specified in this Court's instructions were even mentioned in the agency's order, much less made the basis of any finding; all had their genesis in appellate counsel's argument.[2] As stated in *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962):

> "... The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> '[A] simple but fundamental rule of administrative law ... is ... that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is*

[2] See "Responsive Brief of the Government on Rehearing" in Docket No. 5-28, pp. 10-13, 17-20.

powerless to affirm the administrative action ...' "
(Emphasis added.)

Doe's argument is that the rule should not apply here because the agency, if the matter were remanded to it, would reach the same result on the basis of the findings required by the instructions in *Grigsby-I.* "The short answer to this attempted justification is that the [agency] did not so find." *Burlington, supra,* 317 U.S. at p. 168.

* * *

In June 24, 1976, Order No. 464-K issued creating the Upper Heywood "A" RA SUB, with the Leger well as its unit well. The order was *not* "retroactive," and Grigsby has *not* so argued. But the order established, as a fact of public record, that the Leger well *did not* produce from the Heywood RA SUB, and, therefore, must have produced from a "property" different from the Heywood RA SUB. This order was in existence and spread upon the public records when the Remedial Order was issued on November 29, 1976. And when the Remedial Order ignored its existence (as it did the change in the agency's own regulations in September, 1976), Grigsby promptly called the circumstance to the agency's attention in his administrative appeal (*cf.* R. 31).

DOE's arguments in *Grigsby-I,* on rehearing, led this Court to place burdens on Grigsby "... so that the DOE may, in enforcing price control regulations, rely upon the treatment of production as well as the official designations made by state regulatory agencies." (*Grigsby-I,* 585 F.2d at p. 1085.) The DOE's arguments to this Court, on which the quoted language was based, ignored the facts and the agency's own regulations.

* * *

Here, the fact was officially recognized by the Louisiana authorities and notice thereof spread upon the public records prior to the Remedial Order. If it was not already known to the agency, it was called to its attention prior to the Decision on Appeal (R. 31). But the agency ignored the fact, being led astray by the "all-reservoir unit" figment.

* * *

APPENDIX "P"

IN THE
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

NO. 5-81

JACK W. GRIGSBY,
Appellant

versus

DEPARTMENT OF ENERGY
JAMES EDWARDS and
THE UNITED STATES OF AMERICA,
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

BRIEF OF JACK W. GRIGSBY, APPELLANT

MAY IT PLEASE THE COURT:

This is an appeal by Jack W. Grigsby ("Grigsby") from a final judgment rendered by the United States District Court for the Western District of Louisiana, Shreveport Division (Hon. Tom Stagg, District Judge), on June 30, 1982. After this Court's remand order in *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), cert den. 440 U.S. 908, a trial on the merits ensued. The judgment below

affirmed the administrative order under review, *to-wit:* a certain Remedial Order of the Department of Energy ("DOE"; then the Federal Energy Administration), dated November 29, 1976, as modified by a Decision on Appeal dated March 8, 1977. At the request of DOE, the District Court remanded the matter to DOE to reconsider the refund portion of the administrative order as to the destination of the refund amounts, but not otherwise.

The District Court's opinion (R. 457) makes it clear that the Court felt itself bound by this Court's language in *Grigsby* to the effect (a) that "the sole issue...will be whether the production from the Robert Leger Well No. 1 from October 14, 1974 until June 24, 1976, should be deemed production from the Heywood Sand, Reservoir A, Sand Unit B" (585 F.2d at p. 1086), and (b) that "if the production from the Robert Leger Well No. 1 were apportioned among the lessees who shared an interest in the Heywood RA SUB ... then the production should have been classified as 'old oil'." *Id.* Because the District Court considered itself confined by this language, it did not give effect to the evidence adduced at the trial which demonstrated that the Remedial Order was otherwise clearly erroneous.

Grigsby has appealed from this judgment, on the grounds hereinafter specified.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the agency order under review, absent this Court's instructions in *Grigsby*, is clearly erroneous and not based on substantial evidence, since it is established by this record that its major premise was without foundation, in fact or in law.

2. Whether the "tests" established by this Court's instructions in *Grigsby* were not themselves clearly erroneous, since the agency order under review did not articulate any such tests, but they resulted instead from the *post hoc* argument of appellate counsel.

3. Whether DOE is "estopped" to claim the benefit of such instructions (or may be held to have waived such benefit) by its successful representation to the Supreme Court of the United States that *Grigsby* was "interlocutory" and that the District Court was free to conclude that "...the Leger Well always was producing from a new 'property'...."

4. Whether the judgment below was clearly erroneous and must be reversed because it is in turn based on the supposedly binding effect of the *Grigsby* instructions.

* * *

d. The instructions required Grigsby to establish that production had been apportioned under a voluntary pooling agreement, although there had been no contention that any such agreement existed. Nothing in the Remedial Order suggested this as a test of "treatment."

In *Grigsby* this Court reversed the summary judgment granted by the District Court because it was rendered "prematurely and upon clearly erroneous findings" (585 F.2d at p. 1086). The summary judgment was "premature" because genuine issues of material fact existed, and DOE was not entitled to a judgment as a matter of law. Rule 56(c), *F.R.C.P.* Because it was a premature motion, no discovery had occurred and the barebones record made up was sufficient only to demonstrate that summary judgment was not available. When this Court's opinion

went beyond a reversal of the summary judgment and drew upon the *post hoc* arguments of appellate counsel for directions in deciding the case on remand, it did so not only without the benefit of a full record, but, more importantly, without the benefit of any findings on such subjects by the administrative order under review.

The Supreme Court of the United States, as recently as July 2, 1980, has stated:

> "As we have often held, the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95, 63 S.Ct. 454, 462, 87 L.Ed. 626. ('[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained'); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.(2d) 141, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249, 92 S.Ct. 898, 907, 31 L.Ed.2d 170."
>
> *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 631, n. 31 (1980). See also: *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 159 (1962); *Real v. Simon*, 514 F.2d 738, 739 (CA 5 1975); *Pennzoil v. FPC*, 534 F.2d 627, 631 (CA 5 1976); *Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*, 638 F.2d 1255, 1259-60 (CA 5 1981).

Here, the stated grounds of DOE's order was that the Robert Leger Well No. 1 was producing from the same "property" as the Lucky Strike Well No. 1 because the property was the "Heywood RA SUB" (—and this was clearly

erroneous). Nowhere in the Remedial Order (nor in the Decision on Appeal) is there any question raised, or any mention made, of allocation of production, for example, as an appropriate test for determining whether Leger Well production should be deemed production from the Heywood RA SUB or from a separate property. Nor were any of the other tests contained in the instructions utilized.

Thus, if this Court intended the language in *Grigsby* respecting proceedings on remand to be binding upon the District Court, its decision in *Grigsby* was itself clearly erroneous in that respect.

* * *

IV. DOE WAIVED, OR IS ESTOPPED TO CLAIM, THE BENEFIT OF THE INSTRUCTIONS BY REPRESENTING TO THE SUPREME COURT THAT THE INSTRUCTIONS WOULD NOT SO RESTRICT THE TRIAL COURT'S DECISION.

Because Grigsby feared the effect of this Court's opinion on rehearing, Grigsby applied to the United States Supreme Court for a writ of certiorari (R. 49). Grigsby's petition pointed out to the Supreme Court the nature of this Court's instructions as to "treatment" of production from the Robert Leger Well, and then showed that the agency order under review had not articulated any such grounds, and that under the holding of *Burlington Truck Lines, supra,* the instructions were clearly erroneous. It was Grigsby's hope to elicit Supreme Court response as to the restrictive instructions in the manner of *Lawlor v. National Screen Services Corp.*, 352 U.S. 992 (1957), where the Supreme Court reversed and remanded a case so as to free

a District Court of restrictions imposed by a Court of Appeals on a remand.

In order to respond to Grigsby's fears as to the restrictive effect of the "instructions" on remand and to avoid Supreme Court review, the Solicitor General, on behalf of DOE, assured the Court as follows (R. 73):

> "1. *The judgment below is interlocutory.* The District Court *may conclude* that, *under Louisiana law* and *FEA regulations,* the Leger Well *always* was producing from a new 'property' and thus rule in favor of petitioner, thereby obviating any occasion for this Court's review. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.,* 389 U.S. 327 (1967)." (Emphasis added.)[2]

This representation was successful. Certiorari was denied. (440 U.S. 908.)

In the context of a response to the statements of the petition for certiorari, this was a clear reassurance to the Supreme Court that the "instructions" were neither "final" nor binding on the District Court. Such a result was the target of Grigsby's certiorari petition; its thrust was parried by the Solicitor's assurance to the Supreme Court that this Court remained free to decide that "... the Leger Well always was producing from a new 'property' " "under Louisiana law and FEA regulations." The representations binds DOE. *Cf. Jett v. Zink,* 474 F.2d 1491, 155 (CA 5 1973); *Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510, 512-13 (CA 3 1953) (cited by the 5th Circuit in *Jett v. Zink,*

[2] The dictionary meaning of "interlocutory" is "...not final or definitive...." Webster's Third New International Dictionary, p. 731.

supra); *Texas Co. v. Gulf Refining Co.*, 26 F.2d 394, 397 (CCA 5 1928), cert. den. 278 U.S. 625.

* * *

It is respectfully submitted that the instructions contained in *Grigsby* required the District Court to uphold the agency's order on reasons not stated in the order under review, and that such instructions were themselves clearly erroneous, and should not be considered binding upon this Court. It is also submitted that DOE was precluded on remand from claiming the benefit of such instructions by its successful representations to the Supreme Court. In either or both events, the judgment below should be reversed, and DOE's claim against Grigsby respecting production from the Robert Leger Well dismissed.

* * *

APPENDIX "Q"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

JACK W. GRIGSBY

versus CIVIL ACTION NO. 77-0258

DEPARTMENT OF ENERGY, et al

JUDGMENT

For the reasons assigned in the foregoing opinion,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant and counterclaimant, and against the plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be remanded to the Department of Energy for review of the refund provision of the Remedial Order, consistend with the opinion issued this date.

DATED AND SIGNED at Shreveport, Louisiana, this 30th day of June, 1982.

/S/TOM STAGG
TOM STAGG
UNITED STATES DISTRICT JUDGE

APPENDIX "R"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
No. 77-0258

JACK W. GRIGSBY

versus

DEPARTMENT OF ENERGY, SECRETARY OF
ENERGY JAMES EDWARDS and
UNITED STATES OF AMERICA

(Filed June 30, 1982)

* * *

TOM STAGG—DISTRICT JUDGE

OPINION

This long-standing controversy is on remand from the Temporary Emergency Court of Appeals ("TECA"). The issue to be decided is narrow and is well-defined in the TECA opinion.[1] After hearing arguments and reviewing the record, this court concludes that that issue must be resolved adversely to the plaintiff.

---

[1] Upon remand, the *sole issue* before the District Court will be whether the production from the Robert Leger Well No. 1 from October 14, 1974 until June 24, 1976, should be deemed production from the Heywood Sand, Reservoir A, Sand Unit B.

Grigsby v. Dept. of Energy, 585 F.2d 1069, 1086 (TECA 1978).

BACKGROUND FACTS

This case involves compliance with federal oil pricing regulations. Mr. Grigsby, the plaintiff, is an independent oil and gas operator. He was the operator of the Lucky Strike Well No. 1, which served as the unit well for the Heywood Sand, Reservoir A, Sand Unit B, located in the North Jennings Field. The Louisiana Commissioner of Conservation had created the unit and designated the unit well on February 20, 1969, by Order No. 464-F-1. The unit area resulted from the pooling of five separate leaseholds.

Initially there was a period of substantial production from the Lucky Strike Well. Later, however, the well began to produce excessive salt water. Grigsby then sought permission from the Louisiana Commissioner of Conservation to drill a "substitute unit well". On July 26, 1974, by virtue of Order No. 464-F-2, Grigsby was given permission to drill a well on a different lease in the unit. The "substitute unit well' was named that Robert Leger Well No. 1. The well was spudded on August 4, 1974, and production began on October 14, 1974. During the same month that production began on the Leger Well, plaintiff terminated crude oil production from the Lucky Strike Well. Beginning on October 14, 1974, Grigsby charged upper tier prices for the crude oil from the Leger Well, based on his understanding that the oil could be considered "new oil" under Federal Energy Administration ("FEA") Regulations.

Seventeen months after production began from the Leger Well, plaintiff notified the Commissioner of Conservation of his intent to request an order recognizing two separate reservoirs in the North Jennings Field.[2] In June

[2] The initial notice to the Conservation Commissioner of intention

of 1976 the Commissioner issued two orders acknowledging the existence of two reservoirs in the North Jennings Field. The reservoirs were designated Heywood Sand, Reservoir A, and the Upper Heywood "A" Sand, Reservoir A. The Leger Well No. 1 became the unit well for the Upper Heywood "A" Sand, Reservoir A, Sand Unit B.

On November 29, 1976, the FEA issued a remedial order to Grigsby citing violations of Cost of Living Council Regulations and FEA Price Regulations. The FEA had determined that Grigsby had overcharged customers by billing them at "new oil" prices instead of "old oil" prices since the date production began on the Leger Well. Grigsby was ordered to reduce prices on production from the Leger Well immediately and to refund past overcharges. On December 11, 1976, Grigsby appealed the immediate order to the FEA's Office of Exceptions and Appeals. That remedial order was essentially upheld. Grigsby then appealed the FEA action to the United States District Court. Summary Judgment was granted in favor of the FEA, upholding its orders. The court also entered partial summary judgment in favor of the FEA on its counterclaim for civil penalties, and Grigsby was ordered to comply with the remedial order.

An appeal by Grigsby to TECA followed. The facts stated above are those found by TECA on rehearing.[3] TECA recognized that, as of June 24, 1976, production

---

(Footnote 2 continued)
to apply for a hearing was issued on March 12, 1976. As noted by TECA in its opinion, Grigsby's notice to the Commissioner was given within three weeks after his receipt of the notice of probable violation issued by the FEA Region VI on February 20, 1976.

[3] 585 F.2d 1069, 1080.

from the Leger Well was considered to be from a separate property and, thus, could be properly classified as "new oil". The question, however, was the status of the Leger Well production from its inception on October 14, 1974, until June 24, 1976. TECA declined to give the 1976 order retroactive application because of "[t]he need for certainty and finality in the enforcement of price control regulations." *Grigsby v. Department of Energy*, 585 F.2d 1069, 1085 (TECA 1978). Because neither the record nor the briefs clearly established the status of the well during the questionable time period, TECA remanded the case to this court for consideration of the official status of the well during that twenty-month interval.

The parties disagree completely as to what issues are now before this court. Plaintiff contends that the findings and rationale of the remedial orders are subject to review because they were based on erroneous findings of fact. On rehearing, TECA recognized that this court's original entry of summary judgment was rendered upon clearly erroneous findings. The error occurred when the District Court found that the Division of the Heywood Sand into two reservoirs did not create two new properties and, therefore, the Leger Well produced from the same "property" as the Lucky Strike Well. TECA corrected the error when it recognized that the 1976 order did create two separate properties. As stated previously, however, TECA declined to give the 1976 order retroactive application. It is evident, therefore, that the original erroneous finding does not affect the question of status of the Leger Well from 1974 until 1976.

The Department of Energy ("DOE") contends that this court must confine its decision to the sole issue of the status of the Leger Well during the period in question. The

language used by TECA supports the position taken by DOE. In its conclusion, TECA stated that "[u]pon remand, the *sole issue* before the District Court will be whether the production from the Robert Leger Well No. 1 from October 14, 1974 until June 24, 1976, should be deemed production from the Heywood Sand, Reservoir A, Sand Unit B." *Id.* at 1086 (emphasis added). That language leaves very little room for discussion as to what role this court should now play.

In addition to setting out exactly what issue is to be decided by this court, TECA also suggested guidelines for this court to use in reaching the decision as to the status of the Leger Well. First, it is important to note that the burden is on Grigsby to prove that the Leger Well production was not treated as production from the Heywood Sand, Reservoir A during the period in question. Second, TECA pointed out that this court should direct attention to the fact that the Leger Well was officially designated as the "substitute unit well" for the Heywood Reservoir A, Sand Unit B. Furthermore, TECA stated that an important area of inquiry would be the method used by Grigsby in apportioning the shares of production from the Leger Well. The opinion states that "[i]f the production from the Robert Leger Well No. 1 were apportioned among the lessees who shared an interest in the Heywood RA SUB, in accordance with the [Order No. 464-F-1] pooling order, then the production should have been classified as 'old oil'." *Id.*

The answers given to the questions raised by TECA lead this court to conclude that production from the Leger Well during the period of October 14, 1974 until June 24, 1976, was treated as production from the Heywood Sand, Reservoir A. It is undisputed that the proceeds of production from the Leger Well were apportioned in the same

proportions before and after October 1974 among the same interest owners. In other words, those persons who received royalty payments from the Lucky Strike Well continued to receive payments after that well went to salt water and the Leger Well, as the "substitute unit well", began to produce crude oil. The interest owners received payments in the same proportions as those established under the pooling order for the Lucky Strike Well. Under the mandate of the TECA court, this means that the production should have been classified as "old oil".

In a footnote to its opinion, TECA recognized that if the lessees who shared interests in the Lucky Strike Well were operating under a voluntary pooling agreement, then Grigsby would have to prove that the apportionment of production from the Leger Well was done pursuant to the voluntary pooling agreement rather than the compulsory pooling provision set forth in Order No. 464-F-1. Grigsby has acknowledged that the apportionment of Leger Well proceeds was not done pursuant to a voluntary pooling agreement. (Plaintiff's response to interrogatory no. 3.)

Furthermore, TECA put the burden on Grigsby to reconcile his payment of proceeds to the lessees, even assuming the absence of any pooling agreement for the Leger Well, with the "substitute unit well" designation and his claim that the oil from the Leger Well was "new oil". Grigsby has not met his burden. In deposition, he states that one of the reasons for paying royalties on the Leger Well to the same royalty owners of the Lucky Strike Well was that the Leger Well was drilled "as a replacement well on an established unit." (Grigsby deposition, page 15, lines 14-16.)

Grigsby argues that Ruling 1977-1, 42 Fed.Reg.

3628, 3634 (1977) should apply to this case. That ruling provides as follows:

> It is not uncommon for less than the total premises subject to a right to produce to be unitized or otherwise aggregated with all or portions of premises subject to other rights to produce, to form a single "property" leaving the balance of the premises formally subject to a single right to produce not aggregated with any such rights. The portion of the premises which is not aggregated is appropriately recognized as a property separate and apart from the portion of the premises which has been aggregated with other rights to produce.

His argument, however, ignores the clear language of TECA. TECA stated that Ruling 1977-1 would control "[i]f the Robert Leger Well No. 1 production had been *officially* recognized *at the outset* as production from outside the Heywood Sand, Reservoir A." It is undisputed that it was some 17 months after production began from the Leger Well that official recognition as production from a separate property was given.

For the reasons stated above, this court finds that the plaintiff has failed to meet his burden to prove that production from the Leger Well was not treated as production from the Lucky Strike Well during the period of October 14, 1974 until June 24, 1976. Therefore, judgment is entered in favor of the government.

On July 2, 1981, DOE and the United States moved for remand of this action to DOE for a re-evaluation of its Order of restitution to specific entities. A remand is requested because of the decontrol of oil prices pursuant to

an executive order of President Reagan. Prior to decontrol, DOE controlled the price of oil at every stage of sale and, therefore, could insure that restitution to the first purchaser-refiner would be passed along to the ultimate consumer. DOE alleges that with the advent of decontrol it has no readily available method of insuring that the overcharges are refunded ultimately to the consumer. The agency wants the opportunity to work out a method of restitution.

Grigsby opposes the motion on the basis that if any part of the Remedial Order is to be modified on remand, the Order should be reviewed by the agency *in toto* because it was based on clearly erroneous findings. That argument has been rejected earlier in this opinion. Grigsby also contends that because the purchasers who will benefit from restitution are not parties to this lawsuit this court cannot order modification of an Order that will affect them. He refers to the Economic Stabilization Act of 1970 § 210 (12 U.S.C. § 1904) which affords purchasers a private right of action if overcharges exist. Based on that provision, Grigsby contends that he may be subjected to multiple lawsuits. This court notes that there have been no other lawsuits filed against Grigsby. The purchasers have not been necessary parties to this action up to this time, and there is no reason to make them such now. There is no basis for Grigsby's position that if the Order is modified the rights of purchasers will be affected whereas they are not affected as the Order exists now. Modification of the Order will protect the purchasers.

In support of the motion to remand, the defendants rely on two recent cases wherein similar motions to remand were granted. In *Citronelle-Mobile Gathering, Inc., et al v. James B. Edwards, et al* (TECA, January 21, 1981), TECA

remanded a remedial order to the district court for an order directing the application to the General Accounting Office Procedures Manual. Restitution payments were to be paid to the United States Treasury and held in a "Deposit Fund Account" to be paid out at DOE's direction under General Accounting. In *Sundance Oil Co., et al v. DOE, et al* (U.S. Dist. Ct., Colo., Oct. 29, 1981), the court granted DOE's conditional motion for remand.

This court finds that the motion to remand should be granted, limited to review and modification of the refund provision of the Remedial Order.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 30th day of June, 1982.

/S/TOM STAGG
TOM STAGG
UNITED STATES DISTRICT JUDGE